90-1096

No. 90-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROSALIND MERRIWEATHER,

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI AND APPENDICES

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QUESTIONS PRESENTED FOR REVIEW

I. SHOULD ROSALIND MERRIWEATHER HAVE BEEN PERMITTED TO AMEND HER COMPLAINT TO ADD A CLAIM OF WRONGFUL TERMINATION?

II. DID THE MAGISTRATE AND DISTRICT COURT JUDGE ERR IN DENYING ROSALIND MERRIWEATHER'S MOTION TO COMPEL ANSWERS TO MERRIWEATHER'S FOURTH SET OF INTERROGATORIES?

III. DID THE COURT ERR WHEN IT GRANTED IBM'S MOTION FOR SUMMARY JUDGMENT AS TO MERRIWEATHER'S RACE DISCRIMINATION CLAIM WHEN MERRIWEATHER OFFERED EVIDENCE THAT IBM TREATED MERRIWEATHER DIFFERENTLY THAN OTHER EMPLOYEES IN POSITIONS SIMILAR TO THAT HELD BY MERRIWEATHER AND THE ONLY DISTINGUISHING CHARACTERISTIC BETWEEN THE OTHERS AND MERRIWEATHER WAS HER RACE?

IV. DID THE DISTRICT COURT ERR WHEN IT HELD THAT A DETERMINATION THAT IBM DID NOT DISCRIMINATE AGAINST MERRIWEATHER NECESSITATES A FINDING THAT IBM HAD GOOD CAUSE, AS A MATTER OF LAW, TO TERMINATE MERRIWEATHER?

LIST OF ALL PARTIES

ALL PARTIES ARE LISTED IN THE CAPTION OF THIS CASE.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

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CITATION TO OPINIONS BELOW

— *Merriweather v. IBM*, Court of Appeals Docket Nos. 89-2023; 90-1308, slip op. (6th Cir. September 14, 1990).

— *Merriweather v. IBM*, Court of Appeals Docket Nos. 89-2023; 90-1308, slip op. (6th Cir. July 16, 1990).

— *Merriweather v. IBM*, Civil Action No. 88-CV-72299-DT, slip op. (E.D. Mich. May 10, 1989).

— *Merriweather v. IBM*, Civil Action No. 88-CV-72299-DT, slip op. (E.D. Mich. May 8, 1989).

— *Merriweather v. IBM*, Civil Action No. 88-CV-72299-DT, slip op. (E.D. Mich. March 9, 1989).

— *Merriweather v. IBM*, Civil Action No. 88-CV-72299-DT, slip op. (E.D. Mich. April 6, 1989).

— *Merriweather v. IBM*, Civil Action No. 89-CV-71499-DT, slip op. (E.D. Mich. February 12, 1990).

— *Merriweather v. IBM*, Civil Action No. 89-CV-71499-DT (E.D. Mich. September 22, 1989).

STATEMENT OF JURISDICTIONAL GROUNDS

This Court's jurisdiction is based on 28 U.S.C. §1254(1) to review a judgment of the United States Court of Appeals for the Sixth Circuit in *Merriweather v. International Business Machines*, Court of Appeals Docket Nos. 89-2023; 90-1308 (6th Cir. July 16, 1990). The Sixth Circuit rendered its decision on July 16, 1990. (Ap. A, 1a). On August 1, 1990, Petitioner made a motion for rehearing. On September 14, 1990, the motion for rehearing was denied. (Ap. I, 68a).

STATEMENT OF THE CASE

Rosalind Merriweather, Petitioner, brought two lawsuits—*Merriweather, v. IBM*, Civil Action No. 88-CV-72299-DT (E.D. Mich.) (*Merriweather I*) and *Merriweather v. IBM, et al.*, Civil Action No. 89-CV-71499-DT (E.D. Mich.) (*Merriweather II*). IBM removed *Merriweather I* to federal court because of diversity of citizenship. IBM and the individual Defendants removed *Merriweather II* to federal court alleging diversity of citizenship and fraudulent joinder of the individual Defendants.

In *Merriweather I*, Merriweather had alleged claims of race discrimination, intentional infliction of emotional distress, and breach of a commission contract in the original Complaint. Merriweather attempted to obtain, through discovery, information concerning complaints of racial discrimination or hostility in the workplace. IBM objected to producing the information sought and the district court refused to order the production of that information. (Ap. E, 46a). Merriweather also made a motion for leave to add a wrongful termination claim. The district court denied that motion, (Ap. F, 50a), and the motion for reconsider-

ation. (Ap. G, 53a). The district court then granted IBM's motion for summary judgment, (Ap. B, 3a), and denied Merriweather's motion for reconsideration of the motion for summary judgment, (Ap. C, 25a).

Merriweather began *Merriweather II* when the district court denied the motion to amend. IBM and the individual Defendants removed the case to federal court alleging diversity of citizenship and fraudulent joinder of the individual Defendants. Merriweather moved to have the case remanded to state court, which the district court refused to do. (Ap. H, 56a). The district court then granted Defendant's motion for summary judgment. (Ap. D, 28a).

The Sixth Circuit affirmed, without analysis, the district court judge's decisions. (Ap. A, 1a-2a). The Sixth Circuit also denied Merriweather's motion for rehearing. (Ap. I, 68a).

Merriweather requests that this Court review the Sixth Circuit's decision in this case and reverse it.

STATEMENT OF FACTS[1]

IBM employed Rosalind Merriweather from November of 1976 until August of 1987. Prior to IBM's termination of Merriweather, she had experienced significant difficulties in her relationships with her superiors. (*See*, Merriweather, at 159-164, 170). As a result of these work-related difficulties, IBM placed Merriweather on extended sick leave twice based on her psychological inability to cope with the employment-related stresses. (*See*, Merriweather, at 164, 174, 183). Merriweather's second sick leave ended in April, 1986.

In April, 1986, Merriweather returned to work for IBM. (Merriweather, at 147). IBM placed her in the Renaissance Branch office under Jeff Ray's management. (Merri-

[1] The depositions of Rosalind Merriweather, Hugh Jefferson Ray, and John Kennedy will be referred to throughout the Statement of Facts by the deponent's surname and the relevant page numbers.

weather, at 249-250; Ray, at 80-81). Merriweather held the position of overlay software representative in training. (*See*, Ray, at 59, 72, 94). Ray was responsible for Merriweather's training. Both Ray and John Kennedy, the branch manager, agree that Merriweather was to have a "fresh start." (Ray, at 80-81). Therefore, Merriweather commenced her new position as an overlay representative with a training period to learn the new products assigned to her.

Merriweather successfully completed her training program. (Ray, at 113-115). The satisfactory completion indicated that Merriweather had sufficient product knowledge to be placed on quota. In September, 1986, IBM placed Merriweather on a quota set by Ray. (Ray, at 43-44). Merriweather's quota could be met in two ways—either by her making direct sales to customers or her getting credit for software sold by the Branch's marketing representatives. (Ray, at 94, 101; Kennedy, at 17-21).

Ray stated, during his deposition, that quota attainment carries the greatest weight in determining whether a marketing representative's performance is satisfactory. (Ray, at 44-45). Furthermore, IBM had consistently rated Merriweather in this manner in the past. Merriweather consistently met her quotas. In fact, Merriweather had attained 170% of her SRP quota as of July 31, 1987—a month before her termination. (Ray, at 99-101, 102, 145).

Ray, nevertheless, had placed Merriweather on an improvement plan that required that Merriweather sell certain products during a 90-day time period. Merriweather attempted, without success, to identify sales prospects during that time period. When she failed to make the direct sales, IBM terminated her.[2]

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[2] IBM failed to analyze whether Merriweather had diligently attempted to make the required sales. This is noteworthy because Kennedy testified that it is possible to be diligently working and not make

Merriweather testified that she believes the improvement plan to be a technique to fire IBM employees. (Merriweather, at 406). She also testified that the improvement plan imposed on her by Ray constituted an impossible task. (Merriweather, at 426, 438, 441-42). Furthermore, although the Plan required Merriweather to forecast, it was impossible for her to do so accurately because she was not given the information necessary to do the required forecasting. (Merriweather, at 426).[3]

Immediately prior to this litigation being instituted, Merriweather began a workers' compensation action against IBM. The parties settled that claim and signed a redemption agreement. Prior to signing the agreement the parties had extensive discussions concerning its scope. They agreed that the agreement would not preclude claims that Merriweather might have against IBM such as those asserted in this case.[4]

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any sales for an extended period of time. (Kennedy, at 26-27). Moreover, although Ray told Merriweather to make direct sales, Kennedy did not want Merriweather to make such direct sales. (Kennedy, at 24-25).

[3] Merriweather's inability to accurately forecast stemmed, in part, from her inability to contact the customers. She depended on the information supplied to her by marketing representatives, systems engineers, and marketing managers. (*See*, Merriweather, at 286, 293). She believes that those individuals supplied her with inaccurate information which, in turn, made her forecasts inaccurate. (Merriweather, at 294).

[4] Judge Zatkoff initially held that the Redemption Agreement precluded any further claims by Merriweather against IBM. That opinion provides:

> "The Court finds the redemption agreement to be clear and unambiguous. If Plaintiff's counsel agreed to additional terms he should have incorporated those terms into the written agreement. Regardless of Plaintiff's counsel's failure to incorporate additional terms into the redemption agreement, counsel has failed to document the alleged agreement or other method by Rule 56. Thus, counsels' unsupported al-

Merriweather then commenced litigation against IBM—*Merriweather I*. That case involves claims of race discrimination, intentional infliction ofemotional distress, and breach of contract. Judge Lawrence Zatkoff granted IBM's motion for summary judgment in an opinion issued May 10, 1989. (Ap. B, 3a). Prior to Judge Zatkoff granting that motion, Merriweather attempted to obtain leave to amend her complaint to add a wrongful termination claim. (Ap. F, 50a; Ap. G, 53a). Judge Zatkoff denied the motion to amend. Merriweather then commenced *Merriweather II* against IBM, John Kennedy, and Hugh Jefferson Ray in the Wayne County Circuit Court. Those Defendants removed the case to the U.S. District Court for the Eastern District of Michigan on the basis of diversity of citizenship, alleging fraudulent joinder of the individual Defendants, both of whom are residents of Michigan. Judge Zatkoff refused to grant Merriweather's motion to remand *Merriweather II* to the Wayne County Circuit Court. (Ap. H, 56a). Defendants then moved for summary judgment as to all claims. Judge Zatkoff granted the motion. (Ap. D, 28a).

Judge Zatkoff's opinion addresses the issues of *res judicata*, collateral estoppel, and intentional interference with a contract. In *Merriweather II*, he granted the motion for summary judgment as to the wrongful termination claim on the basis of collateral estoppel, rather than *res judicata*

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legation cannot preclude summary judgment."

The intent of the parties' agreement with respect to preclusion of claims, other than workers' compensation claims, was documented by Merriweather's counsel. (*See* Transcript of Workers' Compensation Redemption Agreement Hearing, at pp. 8-10, 12, which is attached as Exhibit E to R82: Plaintiff's Motion for Reconsideration of Defendant's Motion for Summary Judgment, *Merriweather I*). Judge Zatkoff then agreed with Merriweather on that point and held summary judgment to be appropriate for other reasons. (Ap. C, 26a). Therefore, Merriweather will not include an extended discussion of that issue in this Petition. Merriweather simply continues to contend that the Redemption Agreement fails to preclude the claims brought in *Merriweather I* and *Merriweather II*.

grounds. The opinion provides that a finding in *Merriweather I* that IBM did not engage in racial discrimination requires a finding that IBM had good cause to terminate Merriweather.[5]

Merriweather appealed the decisions in *Merriweather I* and *Merriweather II* to the United States Court of Appeals for the Sixth Circuit. That court affirmed Judge Zatkoff's opinions. The Sixth Circuit, however, failed to analyze any of issues, but merely referred the reader to Judge Zatkoff's opinions and summarily affirmed those decisions. The Sixth Circuit denied Merriweather's petition for rehearing.

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[5] "In Merriweather I, issues of fact were resolved against the plaintiff. Those same issues are now the basis of plaintiff's complaint in Merriweather II. *Specifically, this Court has already determined that plaintiff was not wrongfully discharged, but rather discharged for poor work performance.* Plaintiff, however, argues that the resolution of Merriweather I did not require this Court to determine whether plaintiff was wrongfully discharged or employed under a just cause employment agreement. According to plaintiff, these issues did not need to be considered in order to determine if plaintiff's discharge was tainted by racially discriminatory motives. (Plaintiff's response to defendants' motion for summary judgment, pp. 11-12). In addition, plaintiff claims that a question of material fact exists as to whether plaintiff was discharged for just cause.

Plaintiff's argument is without merit. The Court cannot make a determination as to whether plaintiff was discharged for discriminatory reasons without considering the fact that plaintiff must have been terminated for some reason."

Merriweather v. IBM, Civil Action No. 89-CV-71499-DT, slip op., at pp. 12-13 (E.D. Mich. February 12, 1990) (Ap. D, 38a-39a) (Emphasis added).

REASONS FOR ALLOWANCE OF THE WRIT

I. ROSALIND MERRIWEATHER SHOULD BE ALLOWED TO FREELY AMEND HER COMPLAINT IN THAT THE AMENDMENT WILL NOT UNDULY PREJUDICE IBM.

Merriweather requested leave to file a first amended complaint adding a wrongful termination claim. The addition of the wrongful termination claim would not have unduly prejudiced IBM. Because leave to amend should be freely given, Judge Zatkoff erred in denying the motion to amend.

In *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962), this Court explained that leave to amend should freely be given. In so holding, the opinion provides:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.—leave sought should, as the rules require, be "freely given."

Id. at 182, 83 S. Ct. at 230, 9 L. Ed. 2d at 226.

That the policy of freely granting leave to amend set forth in Fed. R. Civ. P. 15(a) is to be applied with liberality is well-accepted.[6] While the district court has wide discre-

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[6] *See Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990); *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 112 (6th Cir. 1989); *DCD Programs Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987); *Janikowski v. Bendix Corp.*, 823 F.2d 945, 951 (6th Cir. 1987).

tion in deciding on a motion to amend, a denial of a motion for leave to amend must be reversed when the denial amounts to an abuse of discretion. *See Foman*, 371 U.S. at 182, 83 S. Ct. at 230, 9 L. Ed. 2d at 226.[7]

In *Independent Oil and Chemical Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co.*, 864 F.2d 927 (1st Cir. 1988), the court defined "abuse." That court stated that "[a]buse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." *Id.* at 929. *See also United States v. Hastings*, 847 F.2d 920, 924 (1st Cir. 1988); *United States v. Kramer*, 827 F.2d 1174, 1179 (8th Cir. 1987).

In denying Merriweather's motion to amend, the district court violated the policy of freely allowing amendments and abused its discretion. Merriweather made her motion after it became apparent,as a result of the depositions of Kennedy and Ray, that IBM had a policy of terminating its employees only when just cause existed. IBM claimed only that it would be required to redepose Merriweather on the new issue.

Judge Zatkoff made only two findings concerning the motion to amend—Merriweather should have included the wrongful termination claim in her original complaint, and that Merriweather's counsel had stated at a scheduling conference that no other claims would be added. Judge

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[7] The *Foman*Court stated:

> [O]utright refusal to grant the leave without any justifying reason appearing for the *denial is not an exercise of discretion*; it is merely *abuse of that discretion and inconsistent with the spirit of the Federal Rules.*

Id. (Emphasis added).

Zatkoff made no finding, in the March 9, 1989 opinion, of undue delay, dilatory motive, or undue prejudice to IBM.[8]

Although the wrongful termination claim might have been included in the original complaint, it was not. To hold that the motion should be denied because amendment is sought at a later time than the pleading to be amended constitutes a total abrogation of Fed. R. Civ. P. 15 because the amendment will always come at a time later than the pleading that is to be amended. While delay in moving to amend is a relevant factor, it is not a determinative one, unless the delay is undue.[9]

That Judge Zatkoff issued a scheduling order in this case is likewise no reason to deny Merriweather's motion to amend. The scheduling order failed to provide for a

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[8] The whole analysis is contained within two paragraphs that provide:

> Since this lawsuit involves an employment dispute, plaintiff's *Toussaint* claim should have been discovered prior to the filing of the complaint. Plaintiff offers no justifiable reason for the delay.
>
> In addition, plaintiff's motion is contrary to representations previously made to the Court. On July 26, 1988, this Court held a scheduling conference on this matter as required by Fed. R. Civ. P. 16(b). As stated in Rule 16(c) and in the Court's notice of scheduling conference, the parties were instructed to be prepared to discuss various procedural matters. One of the purposes to the scheduling conference was to discuss amendments to the pleadings. Under Rule 16(b)(1) the Court may enter an Order that limits the time to amend pleadings to add parties and claims. After discussing the matter with the Court, the parties explicitly agreed that no additional claims would be added.

Merriweather v. International Business Machines, Civil Docket No. 88-CV-72299-DT, slip op. at p. 2 (E.D. Mich. March 9, 1989) (Ap. F, 51a-52a).

[9] *See Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990); *Loehr v. Ventura County Community Dist.*, 743 F.2d 1310, 1319-1320 (9th Cir. 1984); *State Teachers Retirement Board v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir. 1981).

date by which the parties were required to file motions, other than dispositive ones.[10]

Judge Zatkoff abused his discretion by failing to consider Merriweather's arguments that the depositions of Kennedy and Ray solidified the wrongful termination claim. Furthermore, he gave undue weight to the delay in seeking to amend without analyzing whether bad faith or undue prejudice existed.[11] Moreover, to hold that a scheduling

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[10] The scheduling order provides that the following events occur by the dates specified:

1. Service of the first set of interrogatories—8/25/88;
2. Deadline for filing motions to compel answers to the first set of interrogatories—9/27/88;
3. Witness list exchange date—1/11/89;
4. Discovery cutoff date—1/25/89;
5. Dispositive motion cutoff date—2/15/89;
6. Submission of the pretrial order—5/10/89; and,
7. Final pretrial/settlement conference—5/10/89.

The motion to amend was filed on 2/15/89, which was the dispositive motion cutoff date. That IBM could not have moved for summary disposition on the wrongful termination is of no import because such a motion would have been futile.

[11] Both the District Court and the Sixth Circuit ignored the decision in *Janikowski v. Bendix Corp.*, 823 F.2d 945 (6th Cir. 1987), which is nearly identical in its facts to this case:

	Janikowski	Merriweather
Complaint filed	November 28, 1983	May 10, 1988
Scheduling Order issued	March 20, 1984	July 27, 1988
Discovery cutoff date	October 1, 1984	January 25, 1989
Motion cutoff date	October 1, 1984	February 15, 1989
Defendant's Motion for Summary Disposition	August 14, 1984	February 15, 1989
Plaintiff's Motion to Amend Filed	November 1, 1984	February 15, 1989
Motion for Summary		

order that fails to provide for a motion cutoff date for nondispositive motions totally abrogates the plaintiff's right, pursuant to Fed. R. Civ. P. 15, to amend the complaint is ludicrous. IBM's claim that additional discovery expense justifies denial of the motion to amend is equally ludicrous.[12]

II. BOTH THE MAGISTRATE AND THE DISTRICT COURT JUDGE ERRED IN DENYING MERRIWEATHER'S MOTION TO COMPEL ANSWERS TO HER FOURTH SET OF INTERROGATORIES.

In Merriweather's Fourth Set of Interrogatories, she inquired about "Open Door"complaints made concerning racial discrimination and racial hostility within Defendant's Renaissance Branch. IBM objected to the Interrogatories, but failed to seek a protective order. Merriweather then moved that IBM be required to answer the Interrogatories to which it had objected. The Magistrate denied the Motion as to the Open Door complaints. Judge Zatkoff affirmed that decision. The information is particularly relevant to the racial discrimination claim and the Magistrate and Judge erred in denying the Motion to Compel.[13]

Judgment Granted	March 12, 1985	May 10, 1989
Motion to Amend Denied	April 10, 1985	March 9, 1989

In *Janikowski*, the Sixth Circuit reversed the decision to deny the plaintiff's motion to amend.

[12] *See InterRoyal Corp.*, 889 F.2d at 112; *Janikowski*, 823 F.2d at 952.

[13] Under Fed. R. Civ. P. 26(b)(1), "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." Furthermore, "it is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*

As noted in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 98

That the material sought is itself inadmissible is irrelevant in determining whether it must be released to the party seeking it. The appropriate inquiry is whether the material may lead to the discovery of evidence that is relevant to the litigation.[14] The purpose of such open discovery is to enable full disclosure of the facts prior to trial.[15]

IBM objected that the Interrogatories are not reasonably calculated to lead to the discovery of admissible evidence, unduly burdensome, oppressive, vague and ambiguous, and violative of the privacy rights of individuals who are not parties to this litigation. The objections were,and are, without substance.

A. The information sought by the Interrogatories is designed to lead to admissible evidence relevant to Merriweather's claim of racial discrimination against IBM.

The initial inquiry in determining whether information must be released as routinely discoverable material is whether that information has any relevance to the claims or defenses asserted as part of the litigation. The discovery request seeks information concerning racial discrimination or racial hostility within the Renaissance Branch. The in-

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S. Ct. 2380, 57 L. Ed. 2d 253 (1978), the key phrase in Rule 26(b)(1) is "relevant to the subject matter involved in the pending action." That phrase "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Id.* at 351, 57 L. Ed. 2d at 265. Moreover, this Court emphasized that discovery can be used to "define and clarify the issues raised by the pleadings." *Id.*

[14] *See American Floral Services, Inc. v. Florists' Transworld Delivery Ass'n*, 107 F.R.D. 258, 260 (N.D. Ill. 1985) ("Discovery under the Rules changed the entire concept of litigation from a cards-close-to-the-vest approach to an open-deck policy.").

[15] *See United States v. American Optical Co.*, 39 F.R.D. 580, 586-587 (N.D. Cal. 1966). *See also* Kaufman, *Judicial Control Over Discovery*, 28 F.R.D. 111, 125 (1961).

formation requested is particularly relevant to the claim of racial discrimination.

It is clearly permissible for Merriweather to prove her allegations of race discrimination through statistical evidence.[16] In fact, comparative information and statistics of discrimination are highly relevant and a number of courts have allowed such discovery.[17] One court has stated, "In the problem of racial discrimination, statistics often tell much, and Courts listen." *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir. 1962), *aff'd*,371 U.S. 37, 83 S. Ct. 145, 9 L. Ed. 2d 112 (1962). That the lawsuit seeks only individual relief for a specific instance of discrimination fails to negate the relevance of the employment history of the defendant's other employees. *See Burns v. Thiokol Chemical Corp.*, 483 F.2d 300, 306 (5th Cir. 1973).[18]

The Interrogatories asked that IBM provide Merriweather with information concerning complaints of racial discrimination or racial hostility. The Interrogatories limited themselves to IBM's Renaissance Branch and the time period of 1981-1987.[19] Therefore, the information sought

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[16] *See Coates v. Johnson & Johnson*, 756 F.2d 524, 536-548 (7th Cir. 1985); *Mozee v. Jeffboat, Inc.*, 746 F.2d 365, 373 (7th Cir. 1984).

[17] *See Penk v. Oregon State Board of Higher Education*, 99 F.R.D. 504, 505 (D. Ore. 1982); *Smith v. Community Federal Savings & Loan Ass'n of Tupelo*, 77 F.R.D. 668, 671 (N.D. Miss. 1977).

[18] "Even though a suit seeks only individual relief for an individual instance of discrimination, and, is not a 'pattern or practice' suit by the government or a class action,the past history of *both* Black and White employees is surely relevant information." 483 F.2d at 306. *See also Marquez v. Omaha District Sales Office*, 440 F.2d 1157, 1160 (8th Cir. 1971); *Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355, 358 (6th Cir. 1969); *Georgia Power Co. v. EEOC*, 412 F.2d 462, 468 (5th Cir. 1969).

[19] Interrogatory Number 5 asks IBM to:

> Please state the name of each and every employee of former employee of Defendant that made a formal request for an open door investigation by defendant of racial discrimination

may lead to relevant evidence. The remaining subsections of this Section indicate that the remainder of IBM's objections should have been overruled and IBM should have been ordered to provide the information sought.

B. The Interrogatories are neither unduly burdensome nor oppressive.

The Interrogatories admittedly require IBM to compile and submit lists of information to Merriweather. IBM objected that the Interrogatories are both unduly burdensome and oppressive without being more specific about those objections. Those objections are insufficiently specific to shelter the information from discovery.

Objections to interrogatories must be very specific to shield information from discovery. *Trabon Engineering Corp. v. Eaton Manufacturing Co.*, 37 F.R.D. 51 (N.D. Ohio 1964).[20] Furthermore, when the objection is that the interrogatories are unduly burdensome, the objecting party must prove that the interrogatories are so onerous that the objecting party should not be required to answer them.

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or an incident of racial hostility in the Detroit Renaissance Office in [certain specified years].

The Interrogatories then asked when the Open Door request was filed, whether it was oral or written, whether IBM assigned a corporate investigator to the Open Door request, whether the corporate investigator prepared a report on the request, and for copies of all such reports.

[20] In *Trabon Engineering Corp. v. Eaton Manufacturing Co.*, 37 F.R.D. 51 (N.D. Ohio 1964), the defendant objected to certain interrogatories by stating that they were "oppressive and excessively burdensome because at least 60 days of continuous research would be required to obtain the answers." The court held that the defendant must supply the requested information. In so holding, the court stated that the objections were insufficiently specific in explaining how the interrogatories were oppressive and excessively burdensome to constitute valid objections. *Id.* at 59. *See also Zatko v. Rogers Mfg. Co., Inc.*, 37 F.R.D. 29, 30 (N.D. Ohio 1964).

See Burns v. Thiokol Chemical Co., 483 F.2d 300, 304 (5th Cir. 1973).[21]

The information sought by Merriweather in this case is less extensive than that requested in *Burns* and the objections are less specific than those in *Trabon*. That the Interrogatories would require IBM to research their corporate files and compile lists of information fails to make there quests unduly burdensome. Furthermore, the Federal Rules of Civil Procedure give IBM the option of producing documents responsive to the Interrogatories rather than digesting and compiling the information.

C. The objection that the release of the information would violate privacy rights of persons not parties to this litigation fails to constitute a privilege that would shield that information from discovery.

Information and documents are shielded from discovery only when they can be classified within the category of privileged information. The term "privileged information"

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[21] In *Burns v. Thiokol Chemical Co.*, 483 F.2d 300 (5th Cir. 1973), the court held that merely because an interrogatory requires compilation of an extensive list of individuals fails to make the request so onerous as to be objectionable. In that case, the plaintiff had commenced a lawsuit alleging a racial discrimination at the defendant's Huntsville facility. During discovery, the plaintiff requested, via interrogatories, that the defendant supply the plaintiff with: the personal background and employment history of all white employees at the Huntsville facility for the time period of 1960-1970; a list of all job vacancies at the Huntsville plant during 1960-1970; background information on every person that competed for these vacancies; and, a job-description of each non-bargaining print job at the Huntsville facility. The defendant objected to the interrogatories claiming them to be not relevant and unduly burdensome. The court disagreed with the defendant and ordered it to supply the information requested. *Id.* at 304.

See also Kaufman, *Judicial Control Over Discovery*, 28 F.R.D. 111, 122 (1961) ("It is not enough to point to expense. It must be shown that the expense places an unconscionable burden on the parties and is not in proportion to the money involved.")

necessarily involves whether the information does, in fact, involve some recognized privilege. Because IBM is unable to show that a privilege is involved in the information requested, IBM should have been required to submit it.

The meaning of the term "privileged" as used in Fed. R. Civ. P. 26(b)(1) is determined by referring to the Federal Rules of Evidence. *In the Matter of International Horizons, Inc.*, 689 F.2d 996, 1002 (8th Cir. 1982). The applicable Federal Rule of Evidence, Fed. R. Evid. 501, in turn, makes reference to State law.

Although Fed. R. Evid. 501 confers on the Federal Courts the power to recognize new or novel privileges,[22] the courts have also expressed a hostility toward recognizing new privileges.[23] The courts have, generally, limited

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[22] *See Trammel v. United States*, 445 U.S. 40, 47, 100 S. Ct. 906, 911, 63 L. Ed. 2d 186, 192-193 (1980); *In the Matter of International Horizons, Inc.*, 689 F.2d 996, 1003 (8th Cir. 1982); *In re Dinnan*, 661 F.2d 426, 429 (5th Cir. 1981).

[23] In *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981), the court engaged in an extended discussion of privileges that shield information or communications from the discovery process. After reviewing the typical privileges, the court explained the rationale behind privileges:

> Privileges are based upon the idea that certain societal values are more important than the search for truth. There is no question that the doctrine of privilege or immunity from testifying has been narrowly prescribed. A leading commentator on the law of evidence has remarked:
>
> There must be good reason, plainly shown, for their [privileges] existence. In the interest of developing scientifically the details of the various recognized privileges, judges and lawyers are apt to forget their exceptional nature. The presumption against their extension is not observed in spirit. The trend of the day is to extend them as if they were large and fundamental principles, worthy of pursuit into the remotest analogies. This attitude is an unwholesome one. The investigation of truth and enforcement of testimonial duty demand the restriction, not the expansion of these

the exclusion from discovery to information gained through relationships such as attorney-client, physician-patient, and penitent-priest.

The information sought clearly fails to fall within one of the common law or statutorily created privileges. Furthermore, the term "privilege" should not be expanded to encompass the information requested.

III. THERE REMAINS A QUESTION OF MATERIAL FACT AS TO ROSALIND MERRIWEATHER'S CLAIM OF RACIAL DISCRIMINATION.

State, as well as federal, legislation prohibits an employer from basing employment decisions on an employee's race in Michigan. The Elliott-Larsen Civil Rights Act provides, in pertinent part, that:

> (1) "An employer shall not
>
> (a) Fail or refuse to hire, or recruit, or discharge, or otherwise discriminate against an individual with respect to employment, compensation, or term, condition, or privilege of employment, because of religion, race, color, national origin, height, weight or material status."

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privileges. They should be recognized only within the narrowest units required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice.

Recently, reasoning along these lines has carried the day and judge-made privileges have fallen into disfavor. In recent times, commentators have tended to view privileges as hindering litigation and have generally advocated a narrowing of the field. While a number of new privileges have been established recently, they generally have been statutorily created.

Id. at 429 (quoting 8 Wigmore on Evidence § 2192 (McNaughton ed. 1961)). *See also Trammel v. United States*, 445 U.S. 40, 100 S. Ct. 906, 912, 63 L. Ed. 2d 186 (1980).

MCLA 37.2202(1)(a); MSA 3.548(202)(1)(a).[24] Merriweather has established a *prima facie* case ofracial discrimination. IBM rebuts the inference of racial discrimination by setting forth reasons for her termination that amount to a mere pretext.

Racial discrimination takes one of two forms—"disparate treatment" and "disparate impact."[25] *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S. Ct. 1843, 1854 n. 15, 52 L. Ed. 2d 396, 415 n. 15 (1977). Disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups, but in fact, fall more harshly on one group than another and cannot be justified by business necessity." *Id.* Traditional disparate treatment analysis is involved in this case.

The plaintiff need not present "direct" proof of discriminatory intent.[26] Discrimination "may of course be

[24] Because the principles announced in the Elliott-Larsen Civil Rights Act are substantially similar to those found in Title VII and the Age Discrimination in Employment Act (ADEA), federal substantive law of discrimination has been used in cases involving discrimination claims brought under Elliott-Larsen. *See Jones v. Cassens Transport*, 617 F. Supp. 869, 884-885 (E.D. Mich. 1985); *Matras v. Amoco Oil Co.*, 424 Mich. 675, 385 N.W.2d 586 (1986).

[25] In *Wyatt v. Southland Corp.*, 162 Mich. App. 372, 412 N.W.2d 293 (1987), the court noted that there are two alternative theories for establishing a *prima facie* case of disparate treatment under the Elliott-Larsen Civil Rights Act—traditional disparate treatment analysis; and, proof that the decision maker was predisposed to discriminate.

In *Dixon v. W.W. Grainger, Inc.*, 168 Mich. App. 107, 423 N.W.2d 580 (1987), the court set forth these alternative theories of employment discrimination, describing them as "disparate treatment" and "intentional discrimination." A *prima facie* case of race discrimination can be made in either of the two ways. *Id.* at 114, 423 N.W.2d at 583. *See also Jenkins v. Southeastern Michigan Red Cross*, 141 Mich. App. 785, 369 N.W.2d 223 (1985).

[26] *United States Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983).

proved under ordinary principles of proof by any direct or indirect evidence relevant to and sufficiently probative of the issue."[27] The ultimate factual inquiry in a case of disparate treatment is whether the defendant intentionally discriminated against the plaintiff.[28]

When the plaintiff establishes a *prima facie* case of discrimination, an inference arises that the termination is motivated by a discriminatory motive.[29] Once the causal link is established, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for the action.[30] If the defendant comes forth with such a reason, the plaintiff must prove that the reason asserted is a mere pretext for terminating the employee.[31] Circumstantial evidence may be sufficient to challenge a reason as being pretextual.[32]

If the plaintiff establishes a *prima facie* case and counters any explanation put forth by the defendant by evidence raising a factual question regarding the motiva-

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[27] *Matras*, 424 Mich at 683, 385 N.W.2d at 589.

[28] *Aikens*, 460 U.S. at 715, 75 L. Ed. 2d at 410; *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093, 67 L. Ed. 2d 207, 215 (1981); *International Brotherhood of Teamsters*, 431 U.S. at 335 n. 15, 97 S. Ct. at 1854 n. 15, 52 L. Ed. 2d at 415 n. 15; *Morgan v. Harris Trust & Savings Bank of Chicago*, 867 F.2d 1023, 1026 (7th Cir. 1989).

[29] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668, 677-678 (1973); *Morgan*, 867 F.2d at 1026.

[30] *Burdine*, 450 U.S. at 254, 101 S. Ct. at 1094; *Stanfield v. Answering Service, Inc.*, 867 F.2d 1290, 1294 (11th Cir. 1989).

[31] *Burdine*, 450 U.S. at 253-255, 101 S. Ct. at 1093-1095, 67 L. Ed. 2d at 215-217; *McDonnell Douglas*, 411 U.S. at 802-804, 93 S. Ct. at 1824-1825, 36 L. Ed. 2d at 677-679; *Stanfield*, 867 F.2d at 1294; *Archambault v. United Computing Systems, Inc.*, 786 F.2d 1507, 1512 (11th Cir. 1986).

[32] *See Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 895 (3d Cir.), *cert. dismissed*, 438 U.S. 1052, 108 S. Ct. 26, 97 L. Ed. 2d 815 (1987).

tion behind the discharge, summary judgment is inappropriate. Although it is true that an employer has a right to institute work rules without judicial review, it is also true that the employer must, however rational or irrational those rules, apply them equally to persons of different races.

In *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (1976), this Court emphasized the importance of analyzing comparable employment decisions in cases involving claims of discrimination.[33] The opinion notes that:

> [P]recise equivalence in culpability between employees is not the ultimate question: as we indicated in *McDonnell-Douglas* [*v. Green*, 411 U.S. 792, 804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)], an allegation that other "employees involved in acts against [the employer] of *comparable seriousness* . . . were nevertheless retained. . ." is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext,

427 U.S. at 283 n. 11, 49 L. Ed. 2d at 502 n. 11.

In this case, Merriweather presented evidence concerning the role that attainment of quotas, sell and install, plays in the evaluation process. Jeff Ray started that attainment of one's quota carries the greatest weight in assessing whether an employee's performance is satisfactory.

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[33] The plaintiff need not show identicality of circumstances or inconsistency in application of the identical work rule. *See Bluebeard's Castle Hotel v. Government of the Virgin Islands*, 786 F.2d 168, 172 (3d Cir. 1986); *Moore v. City of Charlotte*, 754 F.2d 1100, 1107 (4th Cir. 1985). ("This mandate sets for lower federal courts the difficult, but not unfamiliar, task of assessing the gravity of offenses on a relative scale.")

Merriweather also provided evidence that of the six overlay software representatives employed by IBM in the State of Michigan in 1987, only Merriweather is black. In response to Merriweather's Fifth Set of Interrogatories, IBM identified the following individuals as being employed as Overlay Software Marketing Representatives in the State of Michigan in 1987:

> R. Hoag (employed in Flint, Michigan)
>
> H. McCubbrey (employed in Kalamazoo, Michigan)
>
> F. Tally (employed in Grand Rapids, Michigan)
>
> J.P. Mills (employed in Detroit Manufacturing & Processing)
>
> D. Biarnes (employed in Southfield, Michigan)

All five of the individuals identified are currently employed by IBM. Three of the individuals failed to meet some part of the quotas assigned by IBM:

> "H. McCubbrey attained 65,340 SRP and 206, 312 IRP in 1987, exceeding the IRP quota, but *failing to meet the SRP quota.*
>
> "F.C. Tally attained 359,811SRP, 342,961. IRP and 233 MRP in 1987, and *failed to attain the assigned quota in all respects.*
>
> . . .
>
> "D.G. Barnes attained 145,514 SRP and 162, 484 IRP in 1987, *failing to meet the sell quota,* but exceeding the install quota."

(Response to Interrogatory Number 18 of Plaintiff's Fifth Set of Interrogatories, at p. 18) (Emphasis added).

On the other hand, Rosalind Merriweather had attained sales points of 307,964 and installation points of 226,592 as of July 31, 1987. In terms of ranking within Michigan

based on IRP, the Michigan overlay software representatives would have been ranked as follows:

	Representative	SRP
1.	F.C. Tally	359,811
2.	J.P Mills	341,192
3.	*Rosalind Merriweather*	307,964
4.	R.D. Hoag	195,823
5.	D.G. Biarnes	145,514
6.	H. McCubbrey	65,340

In terms of IRP, the Michigan representatives would have been ranked as follows:

	Representative	SRP
1.	F.C. Tally	342,961
2.	J.P. Mills	255,892
3.	R.D. Hoag	252,216
4.	*Rosalind Merriweather*	226,592
5.	H. McCubbrey	206,312
6.	D.G. Biarnes	162,484

In terms of ranking within Great Lakes Area 4 based on IRP, Merriweather ranked as follows against all Overlay Software Representatives within that Area:

	Representative	IRP	% YTD
1.	Pape	501,336	53
2.	Lawrie	330,672	80
3.	Stuck	330,672	80
4.	Biarnes	234,664	26
5.	*Merriweather*	206,000	129
6.	O'Connor	160,000	109
7.	Hoag	117,600	51
8.	Ransom	85,713	63
9.	Perna	72,000	30
10.	Allgood	62,310	48
11.	Curran	56,000	139
12.	Baum	53,333	51

13.	Kelmer	50,000	207
14.	Larue	50,000	52
15.	Olszyk	12,000	152

Representative	% YTD IRP
(Ranked according to % of attainment of quota)	
1. Kelmer	207
2. Olszyk	152
3. Curran	139
4. *Merriweather*	129
5. O'Connor	109
6. Lawrie	80
7. Stuck	80
8. Ransom	63
9. Pape	53
10. Larue	52
11. Hoag	51
12. Baum	51
13. Allgood	48
14. Perna	30
15. Biarnes	26

IBM contends that it terminated Merriweather because she failed to perform her job functions. IBM focuses on Merriweather's inability to forecast sales and that her product knowledge was insufficient. It seems incredible that IBM claims that Merriweather had insufficient product knowledge while claiming that IBM personnel adequately trained her. Merriweather's product knowledge came from her IBM training. Merriweather successfully completed that training, according to IBM standards, and should have had adequate knowledge of the products. Apparently, IBM afforded Merriweather inadequate training because it now complains about her product knowledge.

Furthermore, Ray and Kennedy disagree on Merriweather's role at IBM. Ray indicated that he expected Merriweather to make direct sales to customers and that

he required, as part of Merriweather's improvement plan, that she sell five (5) IBM products within a 90-day time period. Ray so adamantly enforced these short-term goals that he informed Merriweather not to pursue leads that might result in sales outside of that time period. Kennedy, however, indicated that Merriweather was not to have direct client contact and that despite her sales efforts it is possible not to close any sales within the 90 days.

Merriweather must prove a *prima facie* case of discrimination and rebut any rationale set forth by IBM. The District Court ruled that Merriweather is unable to prove a *prima facie* case and unable to rebut the rationale set forth by Defendant for Merriweather's discharge. *See Merriweather v. IBM*, Civil Action No. 88-CV-72299-DT, slip op., at pp. 14-15 (E.D. Mich. May 10, 1989) (Ap. B, 20a-22a).

The sole distinguishing characteristic between Merriweather and the other overlay software representatives in Michigan in 1987 was her race.[34]

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[34] The District Court's opinion further states:

> The undisputed facts indicate that plaintiff was not qualified. While plaintiff completed her training program she simply was unable to apply the knowledge she received. Plaintiff does not dispute her inability to forecast potential sales, nor that she was not involved in a significant sale during her employment at the Renaissance Branch office. Likewise, plaintiff cannot rebut the fact that her performance evaluations were below par. Plaintiff reached her quota due to overall branch sales. There is no question that plaintiff was unable to contribute to the branch sales effort.

Merriweather v. IBM, Civil Action No. 88-CV-72299-DT, slip op. at p. 15 (E.D. Mich. May 10, 1989) (Ap. B, 21a).

Merriweather is at a loss to answer the statement that "she was not involved in a significant sale during her employment at the Renaissance Branch office." IBM offered no evidence whatsoever that Merriweather was required to be "involved" in a significant sale in the office to retain her employment.

Questions of material fact remain as to Merriweather's racial discrimination claim. Therefore, Merriweather should be afforded the opportunity of a trial on the merits.

IV. IBM'S DISCHARGE OF ROSALIND MERRIWEATHER CONSTITUTED A BREACH OF THE EMPLOYMENT CONTRACT BETWEEN THEM.

A. There remains a question of material fact as to whether IBM had good cause to discharge Merriweather.[35]

The question of whether an employer had good cause to discharge one of its former employees is clearly a fact specific one. An array of factors are involved in the decision to discharge an employee, including work performance, the employee's attitude, and the facts and circumstances surrounding the discharge. Whether the employer had good cause to discharge the former employee is a question that is not conducive to disposition in a Summary Judgment proceeding. Therefore, IBM's Motion for Summary Judgment should be denied as to the contention that it had good cause to discharge Merriweather.

In *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980), the court held that the question of whether good cause existed to discharge the former employee is a question for the jury. There, the court expressly held that the jury is to determine whether good cause existed for the discharge when there exists a dispute as to the adequacy of the employee's job performance. *Id.* at 621-623, 292 N.W.2d at 896.[36]

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[35] There is no serious dispute as to whether IBM needed good cause to terminate Merriweather. Both Ray and Kennedy testified that IBM policy requires good cause to terminate an employee.

[36] That the existence of good cause for the discharge is a jury question has ample other support. *See Diggs v. Pepsi-Cola Metropolitan Bottling Co.*, 861 F.2d 914, 920-921 (6th Cir. 1988); *Wiskotoni v. Michigan National Bank-West*, 716 F.2d 378, 386 (6th Cir. 1983); *Ritchie v. Mich-*

Judge Zatkoff's opinion holds, in essence, that whenever a determination is made that the employer terminated an employee for reasons other than discrimination that the employer had good cause for the termination as a matter of law. A determination that race did not motivate a termination does not require a finding that good cause existed for the termination. The determination of good cause continues to be a determination for the jury. Therefore, Judge Zatkoff's ruling on the race claim fails to collaterally estop Merriweather from asserting an actionable claim of wrongful termination. Therefore, she should be allowed to amend her complaint and proceed to a trial on the merits of her wrongful termination claim.

CONCLUSION

Petitioner respectfully requests that this Court grant her petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, reverse that Court, and remand this case for further discovery and a trial on the merits.

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December 12, 1990

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igan Consolidated Gas Co., 163 Mich. App. 358, 368-371, 413 N.W.2d796 (1987); *Struble v. Lacks Industries Co., Inc.*, 157 Mich. App. 169, 175, 403 N.W.2d 71, 74 (1986); *Hetes v. Schefman & Miller Law Office*, 152 Mich. App. 117, 121, 393 N.W.2d 577, 578 (1986); *Rasch v. City of East Jordan*, 141 Mich. App. 336, 367 N.W.2d 856 (1985); *Schwartz v. Michigan Sugar Co.*, 106 Mich. App. 471, 477-478, 308 N.W.2d 459, 462 (1981), *leave denied*, 414 Mich. 870 (1983); *Schipani v. Ford Motor Co.*, 102 Mich. App. 606, 612, 302 N.W.2d 307, 311 (1981).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 89-2023/90-1308

ROSALIND MERRIWEATHER,
Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS MACHINES,
Defendants-Appellee.

FILED

JUL 18 1990

LEONARD GREEN, Clerk

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Before: **MERRITT,** Chief Judge; **JONES,** Circuit Judge; and **PECK,** Senior Circuit Judge.

PER CURIAM. On May 10, 1988, Rosalind Merriweather commenced a lawsuit (*"Merriweather I"*) (Case No. 89-2023) against International Business Machines ("IBM") alleging race discrimination in violation of Michigán's Elliot-Larsen Act, MCLA § 37.2202(1)(a), intentional infliction of emotional distress and failure to pay commissions. IBM removed the action to the United States District Court for the Eastern District of Michigan on grounds of diversity of citizenship.

On February 15, 1989, IBM moved for summary judgment. On the same date, Merriweather moved for leave to file a first amended complaint in which she sought to

add a wrongful discharge/breach of implied contract claim. The district court denied Merriweather's motion while granting summary judgment to IBM. In addition to appealing *Merriweather I* to this court, Merriweather instituted a separate action ("*Merriweather II*") (Case No. 90-1308) in Michigan state court alleging wrongful discharge against IBM and claims of intentional interference with a contract against IBM employees Eugene Kennedy and Hugh Jefferson Ray. Although Kennedy and Ray were residents of the same state as the plaintiff, IBM removed the case to federal district court on grounds of diversity, asserting that Kennedy and Ray had been fraudulently joined as defendants. The district court agreed and refused to remand the case to state court. The district court granted summary judgment in favor of Kennedy and Ray, and held that Merriweather was collaterally estopped from asserting a wrongful discharge claim against IBM in light of the court's grant of summary judgment for IBM in *Merriweather I*. The appeals of *Merriweather I* and *Merriweather II* have been consolidated.

After careful consideration of the record, the briefs submitted, and the arguments of counsel, we find no error in the orders of the district judge.

Accordingly, we hereby **AFFIRM** based on the reasoning set forth in the district court's orders entered on May 10, 1989, September 22, 1989, and February 12, 1990.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 88-CV-72299-DT

HONORABLE LAWRENCE P. ZATKOFF

ROSALIND MERRIWEATHER,

Plaintiff,

vs.

INTERNATIONAL BUSINESS MACHINES,
a foreign corporation,

Defendant.

A TRUE COPY

CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

BY /s/ R. P. Nastwold
DEPUTY CLERK

JUDGMENT

IT IS ORDERED AND ADJUDGED that this action is hereby DISMISSED pursuant to the Memorandum Opinion and Order dated May 10, 1989.

Dated at Detroit, Michigan, this 10th day of May, 1989.

DAVID R. SHERWOOD
CLERK OF THE COURT

BY: /s/ R. P. Nastwold
DEPUTY CLERK

APPROVED:

/s/ L. P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Pursuant to Rule 77(d), FRCivP
COPIES HAVE BEEN MAILED TO THE FOLLOWING:
Joseph A. Ritok, Jr.
Lauren A. Rousseau
Joseph A. Golden
Lionel J. Postic
on May 10, 1989
/s/ R. P. Nastwold
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 88-CV-72299-DT

HONORABLE LAWRENCE P. ZATKOFF

ROSALIND MERRIWEATHER,

Plaintiff,

vs.

INTERNATIONAL BUSINESS MACHINES,
a foreign corporation,

Defendant.

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 10th day of May, 1989.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

This suit involves an employment dispute. Plaintiff, a black female, is a resident of the state of Michigan and is a former employee of defendant. Defendant, International Business Machines (IBM), is a New York corporation which maintains its principal place of business in New York. IBM maintains sales offices within the State of Michigan.

This matter is currently before the Court on defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 56. Plaintiff instituted this suit on May 10, 1988, in the Wayne County Circuit Court for the State of Michigan. Plaintiff's Complaint asserts three counts—a count for race

discrimination in contravention of the Michigan Elliott Larsen Civil Rights Act, MCL 37.2101 *et seq.*; a count for intentional infliction of emotional distress; and a count for breach of contract arising out of failure to pay commissions due. The lawsuit was timely removed to this Court pursuant to 28 U.S.C. § 1441, based upon diversity of citizenship, 28 U.S.C. § 1332(c). Discovery is now complete, plaintiff has responded to the instant motion, and the matter is ripe for disposition.

STANDARD OF REVIEW

Summary judgment is appropriate where no genuine issue of material fact remains to be decided and the moving party is entitled to judgment as a matter of law. *Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1986); Fed. R. Civ. P. 56(c). "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, ___, 106 S.Ct. 2548, 2552-2553 (1986). In applying this standard, the Court must view all materials offered in support of a motion for summary judgment, as well as all pleadings, depositions, answers to interrogatories, and admissions properly on file in the light most favorable to the party opposing the motion. *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S. Ct. 2505, 2510 (1986); *United States v. Diebold*, 368 U.S. 654 (1962); *Cook v. Providence Hosp.*, 820 F.2d 176, 179 (6th Cir. 1987); *Smith v. Hudson*, 600 F.2d 60 (6th Cir. 1979), *cert. dismissed*, 444 U.S. 986 (1979). In deciding a motion for summary judgment, the Court must consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at ___, 106 S.Ct. at 2512. Although summary judgment is disfa-

vored, this motion may be granted when the trial would merely result in delay and unneeded expense. *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491 (1962); *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 675 (6th Cir. 1986). Where the non-moving party has failed to present evidence on an essential element of their case, they have failed to meet their burden and all other factual disputes are irrelevant and thus summary judgment is appropriate. *Celotex*, 477 U.S. at ___ ; 106 S.Ct. at 2553; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. ___ , 106 S.Ct. 1348, 1356 (1986) ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." (footnote omitted)).

FACTS

Plaintiff commenced her employment with IBM in November, 1976, as an account marketing representative trainee. After completion of a training period, plaintiff was assigned a sales territory and quota. Plaintiff's performance was satisfactory from 1976 to 1980.

In 1981, plaintiff's only child died and her marriage ended in divorce. As a result, plaintiff was no longer able to perform her job duties with the same proficiency she had in the past.[1] From sometime in 1981, through 1984, plaintiff's job performance declined.

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[1] By plaintiff's own admission, her personal problems affected her job performance:

> . . . [F]or whatever reason, I had a failed marriage. Now, out of all these years, 1981 through 1984, all of the things that I could do effectively and successfully from 1977 to 1980 all of a sudden I can't do those and it seemed as though these people were taking the very last thing that I had left, all I had was a job. . . .

Merriweather dep. p. 213.

In 1982 plaintiff did not meet her sales quota and in 1982 and 1983, plaintiff received performance reviews which were at the low end of satisfactory.

In 1984, plaintiff was assigned a new marketing manager, Margo Eurick, and a new sales territory. Eurick provided plaintiff with a document entitled "1984 Last Half Action Plan," a plan which specifically outlined conduct to be performed by plaintiff in order for her to meet her goals for 1984. Merriweather dep., p. 166. Eurick also provided plaintiff with an "Employee Development Plan" which provided suggestions for improvement of plaintiff's performance. *Id.* at p. 182. Notwithstanding the action taken by Eurick, plaintiff testified that Eurick was tring to fire her. *Id.* at p. 164. Plaintiff submits that her sales territory was too small to satisfy the sales quota imposed upon her. *Id.* at pp. 162, 186. However, plaintiff does not recall ever requesting additional sales territory. *Id.* at p. 186.

Plaintiff was on sick leave from October through December, 1984. During that period, plaintiff filed an "open door"[2] complaint with IBM management. Plaintiff alleged that she was treated unfairly by Eurick. However, plaintiff did not claim the unfair treatment was the result of race discrimination.[3] Ultimately, IBM agreed to temporarily take plaintiff out of the sales force, off quota and into a six-month re-education program which she commenced after returning from sick leave.

For the first six months of 1985, plaintiff's only job duty was to prepare for and attend re-training classes. *Id.*

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[2] An "Open Door" complaint is an internal grievance procedure wherein salary employees make known to upper management complaints about working conditions or on-the-job treatment.

[3] Merriweather dep. p. 194. In addition, plaintiff has testified that throughout her employment, Margo Eurick never treated her differently because of her race. *Id.* at p. 166.

at p. 200. Plaintiff was not given a sales territory, she was not expected to make any sales calls and she was not required to meet a quota. *Id.*

Plaintiff was scheduled to return to the sales force in June, 1985. However, rather than returning to work plaintiff again claimed sick leave due to her emotional state. *Id.* at pp. 220-222.

While on her second sick leave, plaintiff retained counsel to negotiate a return to work in a low stress position that did not impose sales quotas. Plaintiff returned to work in April, 1986, with her doctor's approval. Plaintiff was placed in IBM's Detroit Renaissance Center office and given the position of overlay software representative in training. Plaintiff was given the position of overlay software representative because it greatly reduced the stress of a full sales quota.[4] An overlay software representative is assigned a quota, however, an overlay software representative receives credit for each piece of software sold by the account marketing representatives of the branch. Thus, if branch sales are up, an overlay software representative can achieve quota without making a sale. This quota system recognizes a presumption that the product knowledge and marketing skills of the overlay software representative contribute to branch success.

In April, 1986, plaintiff was provided a performance plan that required her to complete a training period to educate her regarding IBM's various software products and marketing techniques. The training period lasted five months. During the training period plaintiff met the branch account marketing representatives and eventually escorted them on customer calls. The training period ended in August and in September, 1986, plaintiff fully undertook her duties

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[4] The parties do not elaborate on whether plaintiff was given the position of overlay software representative as a result of negotiation with IBM by plaintiff's counsel, or whether IBM placed plaintiff in that position on its own accord.

as overlay software representative. Plaintiff also received a written evaluation which gave her a low but satisfactory rating.

The evaluation provided, in part:

> **OFFICE SKILLS DEVELOPMENT**
>
> While Roz attended classes that specialized in office systems, she recognizes a need to enhance her DISOSS and PC software skills. She has not demonstrated her understanding of connectivity to her manager. . . . Roz is aware that her technical credibility is key to her success and has an action plan in place to develop her proficiency immediately.
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> . . . While [Roz] was expected to prove herself through at least three formal demos and presentations, she only completed one formal presentation on AS and one informal presentation of AS in a call at AAA. Roz understands demos and presentations are an intrinsic part of the successful sell cycle. . . .

The evaluation listed three areas that needed improvement: (1) initiative in closing business; (2) enhancement of office technical skills; and (3) meeting commitments to management.

From September to December, 1986, plaintiff's performance was sub-par. Plaintiff's lack of product and marketing knowledge caused the account marketing representatives to avoid utilizing her assistance. Marketing Manager Steve Miltenberger documented some of the complaints received from account marketing representatives in a memo to plaintiff's supervisor, Jeff Ray, dated November 6, 1986. The memo stated that plaintiff's product knowledge was very weak and that plaintiff often requested meetings to

cover material discussed in previous meetings. Miltenberger stated he was concerned about the credibility of the entire account team. In December, 1986, Jeff Ray informed plaintiff that if she did not improve her performance she would receive an unsatisfactory rating on her next formal evaluation.

On April 2, 1987, plaintiff received an unsatisfactory performance evaluation. The evaluation indicated plaintiff failed to meet job expectations in the areas of customer plans and programs, territory objectives and professional responsibilities. The evaluation was summarized as follows:

> Roz is a positive and eager member of the branch. Her efforts must, however, be weighed against her results and contribution. She has not met her marketing objectives. She has not been an active participant and contributor to a win and was not at all involved in a key loss. She does not understand the realistic opportunity in the office and is not conversant with current marketing situations. She has not maintained a working plan of her accounts. She has not developed an Executive Education Plan. Her peer credibility continues to suffer based on lack of product knowledge and effective use of their time. She must improve in her use of resources. Her leadership has not been demonstrated in a successful marketing effort. She is respected for her positive "Can Do" attitude and sincere desire for improvement, but is not meeting the requirements of the job. Roz's overall performance does not meet the requirements of the job.

After receiving her April, 1987, evaluation, plaintiff filed her second open door complaint. Again, plaintiff alleged she had been treated unfairly but the unfair treament was not alleged to be related to race. An investigator was assigned to the complaint. The investigator concluded that

plaintiff was treated fairly and thus, plaintiff was placed on a ninety-day improvement plan.[5]

The improvement period commenced on May 22, 1987. Plaintiff was provided a six-point marketing objective plan that required:

1. Identification of five marketing opportunities in the 90-day period;
2. Qualify opportunities with input from branch reps and marketing management;
3. Develop effective marketing strategies with the objective of selling and/or installing product identified in plaintiff's five marketing opportunities by August 31, 1987;
4. Identification of milestones for above mentioned strategies that allow for the closing of business by August 31, 1987;
5. Meet milestone dates; and
6. Make plan changes with management concurrence.

The plan outlined territory objectives and professional responsibilities. The plan also provided that:

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[5] It is defendant's position that the investigator found that plaintiff was not treated unfairly. Plaintiff's response brief does not challenge defendant's assertion. However, nothing in the record expressly states the investigator's finding. Plaintiff testified that she did not recall the results of the investigation. Merriweather dep. p. 371. Plaintiff recalled, however, that the investigator told her she would have to go on an improvement plan.

Since an employee is placed on an improvement plan as a consequence to an unsatisfactory performance review, the Court accepts defendant's conclusion that the investigator found plaintiff's second Open Door complaint to be without merit. If plaintiff's open door complaint was found to be meritorious, the unsatisfactory performance review would have been retracted.

> [f]ailure to satisfactorily complete any phase of the improvement plan or failure to demonstrate immediate marked and sustained improvement during the improvement period will result in your termination from IBM at any time during the improvement period.

Plaintiff's supervisor, Jeff Ray, offered plaintiff advice during the 90-day improvement period and stressed to plaintiff the need to close sales within the ninety-day period. Merriweather dep. p. 384. In addition, Ray referred plaintiff to an IBM systems engineer to aid plaintiff with her forecasting abilities. *Id.* at 378. Pursuant to the plan, Ray asked plaintiff to submit her five prime sales opportunities. Plaintiff identified five clients, but changed the prospective clients several times during the improvement period. *Id.* at pp. 415-420.

On September 4, 1987, plaintiff received a formal performance evaluation of unsatisfactory. As a result, plaintiff was terminated from her employment. *Id.* at p. 435. While plaintiff's commission statement indicates plaintiff satisfied her quota, she did so only because of the efforts of the account marketing representatives of the branch. Ray dep. pp. 99-104.

Shortly after her discharge, plaintiff filed a workers' compensation claim. On April 13, 1988, less than one month before filing the instant lawsuit, plaintiff redeemed her workers' compensation claim for $80,000. The redemption agreement provides, in relevant part:

> Plaintiff and Defendants herein realize that there are disputes as to legal liability and as to the medical causation in this manner. In view of the above disputes, and because of the uncertainty of litigation it is stipulated and agreed to by and between the parties hereto that payment of the amount herein stated is intended to forever re-

lease Defendants herein from all actions, causes of action, claims and demands for, upon, or by reason of any damage, loss, expenses, injury or disease, known or unknown, which may be traced either directly or indirectly to Plaintiff's employment with Defendant, even though Plaintiff may not have made claim for any of these injuries or diseases as of this time.

Plaintiff understands that this is a full and final settlement of any and all claims for injuries or diseases which he [sic] may have sustained at any time in the course of this employment with the Defendants. (Emphasis added).

LAW

A. PLAINTIFF RELEASED IBM FROM LIABILITY FOR ALL CLAIMS ARISING FROM HER EMPLOYMENT

Defendant argues it is free from liability as a result of the clear and unambiguous language of the workers' compensation redemption agreement. Plaintiff responds the redemption agreement fails to preclude plaintiff's current claims for two reasons. First, plaintiff's counsel submits he participated in the negotiations which resulted in the redemption agreement. Plaintiff's counsel asserts that during settlement negotiations, counsel for defendant agreed the workers' compensation redemption was separate and distinct from the claims alleged in this action. Second, plaintiff submits it is clear under Michigan law that the exclusive remedy provision of the Workers' Disability Compensation Act does not preclude claims for mental and physical injury resulting from employment discrimination.

This Court is not persuaded by plaintiff's arguments.

It is well-settled that when the language of an agreement is unambiguous, the meaning of the language is a question of law. *Michigan Chandelier Co. v. Morse*, 297 Mich. 41 (1941). In *Morse* the court held:

> The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest. It is not within the function of the judiciary to look outside of the instrument to get at the intention of the parties and then carry out that intention regardless of whether the instrument contains language sufficient to express it; but their sole duty is to find out what was meant by the language of the instrument (citation omitted).
>
> * * *
>
> We must look for the intent of the parties in the words used in the instrument. This Court does not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning.

297 Mich. at 49.

The Court finds the redemption agreement to be clear and unambiguous. If plaintiff's counsel agreed to additional terms he should have incorporated those terms into the written agreement. Regardless of plaintiff's counsel's failure to incorporate additional terms into the redemption agreement, counsel has failed to document the alleged agreement by affidavit or other method provided by Rule 56. Thus, counsel's unsupported allegation cannot preclude summary judgment.[6]

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[6] Fed. R. Civ. P. 12(e) provides in relevant part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but *the adverse party's response, by affidavit or as otherwise provided in this rule, must set forth*

Plaintiff also argues that the exclusive remedy provisions of the Workers' Compensation Act do not preclude claims resulting from employment discrimination. *Boscaglia v. Michigan Bell Telephone Co.*, 420 Mich. 308 (1984). This Court agrees with the above cited legal proposition. However, the scope of the Workers' Compensation Act is not relevant to the issue before the Court. The issue to be resolved by this Court is whether the clear and unambiguous language of a Workers' Compensation Redemption Agreement can bar a subsequent claim for employment discrimination.

This Court finds as a matter of law that a Workers' Compensation Redemption Agreement can incorporate a release of liability for claims not precluded by the exclusive remedy provisions of the Workers' Compensation Act. The same finding has been reached by the Michigan Court of Appeals on at least two occasions.

In *Beardslee v. Michigan Claim Services, Inc.*, 103 Mich. App. 480 (1981), the plaintiff injured his knee in the course of his employment. The insurer, through its agent, possessed medical information proscribing plaintiff's return to work. Nonetheless, the insurer, through its agent, instructed plaintiff to return to work and ignore the pain. Plaintiff returned to work aggravated the knee to the extent the injury resulted in total and permanent disability. Plaintiff filed a workers' compensation claim which was eventually redeemed. The plaintiff signed a release which provided that he forever released and discharged defendants "from any and all liabilities, causes of action, damages, claims and demands of whatsoever kind or nature. . . ." In addition, the settlement was placed on the

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specific facts showing that there is a genuine issue for trial. (Emphasis added).

Plaintiff's counsel has provided no affidavit or other suitable evidence to support his allegation that the redemption agreement was not intended to preclude the instant litigation.

record before the State Administrative Law Judge wherein the following discussion occurred:

> Defense Counsel: . . . Your Honor, [plaintiff's counsel] was kind enough last time to indicate that he was waiving or releasing any personal claim he might have against. . . the defendants for tortious conduct in the handling of this case, and I request that he indicate that again.
>
> Plaintiff's Counsel: Yes, I personally release [defendants] for any defamation of character which I had indicated they might be responsible for in the past.

See Beardslee, 103 Mich. App. at 483-84.

Approximately one year later, plaintiff filed suit against his former employer, the employer's insurer and their agents in the state circuit court alleging defendants tortiously handled plaintiff's workers' compensation claim. The trial court granted accelerated judgment finding that plaintiff had released defendants of all claims arising out of plaintiff's employment.

The issue on appeal was "whether a release signed in conjunction with a Workers' Compensation Redemption Agreement can be effective to bar a subsequent non-compensation-related cause of action brought by a claimant who signed the release." *Id.* at 485. The *Beardslee* court found that:

> [w]hen the identity of the alleged tortfeasors and those who would be liable under a workers' compensation claim are identical or substantially the same, or even arguably interrelated, we can see no reason why all liability cannot be settled in one transaction.

Id. at 488. The *Beardslee* court found that the negligent acts upon which plaintiff sought recovery were expressly

waived in both the redemption proceeding and the release signed by plaintiff. Thus, the summary dismissal was affirmed.

In *Nunley v. Practical Home Builders*, No. 101468 (C.A. Mich. December 19, 1988), the plaintiff filed a workers' compensation claim arising out of a work related injury. Plaintiff redeemed the claim and signed a redemption agreement which provided, in relevant part, that:

> . . . in consideration of a settlement of the claim through redemption proceedings with the Workmen's Compensation Department, [plaintiff] does hereby voluntarily quit his/her employment with [defendants], waives any and all seniority rights he/she may have and releases any claim he/she may have for re-employment based on such seniority rights.

Subsequent to redeeming the workers' compensation claim, plaintiff filed suit alleging a claim of race discrimination in violation of the Michigan Elliott Larsen Act. The trial court granted summary judgment finding that plaintiff's suit was barred by the release he signed in redeeming his workers' compensation claim.

The appellate court affirmed. While the release signed by Nunley was not as broad as the release in *Beardslee*, the *Nunley* court expressly found that the language incorporated in the release was broad enough to bar Nunley's claims.

A similar ruling was rendered out of this district in *Hill v. Terminix Intern, Inc.*, 716 F.Supp. 1030 (E.D. Mich. 1985)(Feikens,J.). In *Hill*, plaintiff redeemed a workers' compensation claim and in so doing, signed a Release and Waiver of Seniority. The release provided that plaintiff "voluntarily quit. . . and waived[d] any and all seniority rights." *Hill* at 1032. Thereafter, plaintiff filed a law suit alleging wrongful termination. Judge Feikens found the

language of the release broad enough to encompass plaintiff's employment termination claims. *Id.*

In addition, this Court notes the general rule of Michigan law that the construction of redemption agreements is governed by the same rules as other settlement agreements. *Beardslee*, 103 Mich. App. at 485 citing *Miller v. City Ice & Fuel Co.*, 279 Mich. 592 (1937). Furthermore, when the language to an agreement is unambiguous, the meaning of the language is a question of law.

Applying all of the above cited legal principles to the instant case, this Court finds that plaintiff released defendant from liability arising out of the claims asserted in this lawsuit.[7] The release signed by plaintiff unambiguously provides:

> that payment of the amount herein stated is intended to forever release Defendants herein from all actions. . . known or unknown, which may be traced directly or indirectly to Plaintiff's employment with Defendant. . . .

In arriving at this determination, the Court notes that plaintiff's current counsel also represented plaintiff in the redemption of the workers' compensation claim. The Court also notes that the redemption agreement is not a form agreement consisting of boilerplate terms. Rather, the exact language of the agreement was negotiated between

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[7] On March 9, 1989, this Court denied plaintiff leave to amend the complaint to assert a claim of wrongful termination. On April 6, 1989, the Court denied reconsideration of the denial to amend. The Court denied leave to amend both initially and upon reconsideration for several reasons including undue delay on the part of plaintiff in bringing the amendment, undue prejudice to defendant and dilatory motive on the part of plaintiff. Given the Court's finding that plaintiff released defendant from all liability arising out of plaintiff's employment, the Court notes that any amendment to the complaint would have been futile since the wrongful termination claim is also waived by plaintiff's release.

counsel. The unambiguous language of the agreement must prevail.

B. PLAINTIFF CANNOT ESTABLISH RACE DISCRIMINATION

Plaintiff would fair no better even if her claims were not released by the redemption agreement. Plaintiff alleges a claim of disparate treatment race discrimination in violation of the Michigan Elliott Larsen Act, MCL 37.2101 *et seq.* Claims of disparate treatment race discrimination feature a shifting burden of proof. First, a plaintiff must prove a prima facie case of race discrimination. The burden then shifts to the defendant to articulate some legitimate, non-discriminatory reason for the employees rejection. If defendant satisfies this requirement it is then incumbent upon the plaintiff to show that the non-discriminatory reason articulated by defendant is but a mere pretext to discrimination. *Jenkins v. Southeastern Michigan Chapter, Am. Red Cross*, 141 Mich. App. 785 (1985).

For plaintiff to make a prima facie showing of race discrimination she must prove:

1. she is a member of a protected class; and

2. for the same or similar conduct she was treated differently than a member of a non-protected class.

See, *Schipani v. Ford Motor Co.*, 102 Mich. App. 606, 617 (1981).

Under the Elliott-Larsen Civil Rights Act, summary judgment is appropriate where plaintiff cannot factually establish a prima facie case, or where plaintiff cannot establish a genuine issue of material fact as to whether the non-discriminatory reasons articulated by defendant are but a pretext to unlawful discrimination. *Clark v. Uniroyal*, 119 Mich. App. 820, 825 (1982).

Applying the above cited principles to this case the Court finds that plaintiff has failed to prove that she was treated differently because of her race. Plaintiff has stated during her deposition that she does not know if any account representatives were treated differently, nor does plaintiff have any personal knowledge of the goals and performance plans imposed upon similarly situated white employees. Merriweather dep. pp. 99-100, 276. Furthermore, plaintiff has testified she does not believe she was treated differently because of her race.[8]

Plaintiff disengenuously argues that plaintiff has established a prima facie case of discrimination because she was discharged despite the fact she was qualified. Plaintiff suggests she must be presumed qualified because she had successfully completed the training program and she had attained her quota on the date of her termination.

The undisputed facts indicate plaintiff was not qualified. While plaintiff completed her training program she simply was unable to apply the knowledge she received. Plaintiff does not dispute her inability to forecast potential sales, nor that she was not involved in a significant sale during her employment at the Renaissance Branch office. Likewise, plaintiff cannot rebut the fact that other employees complained about her performance, and that her performance evaluations were below par. Plaintiff reached her quota due to overall branch sales. There is no question that plaintiff was unable to contribute to the branch sales effort.

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[8] Plaintiff has testified that she *may* have been discriminated against in the time period of 1981 to 1984. Merriweather dep. p. 300. The limitations period for discrimination claims brought under the Michigan Elliott Larsen Act is three years. *Thomas v. MESC*, 154 Mich. App. 736 (1986). The instant complaint was filed on May 10, 1988. Thus, any claim of discrimination which occurred prior to May 10, 1985 is time barred.

Given the undisputed evidence, the Court finds no genuine issue of material fact and that defendant is entitled to judgment as a matter of law.

C. PLAINTIFF CANNOT ESTABLISH A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Plaintiff also asserts a claim for intentional infliction of emotional distress. It is unclear whether the tort of intentional infliction of emotional distress may be maintained under Michigan law. *See Roberts v. Auto-Owners Ins. Co.*, 422 Mich. 594, 597 (1985) (Held: "We are constrained from reaching the issue of whether [the tort of intentional infliction of emotional distress] should be formally adopted into our jurisprudence. . . "). Nonetheless, some Michigan courts have recognized the cause of action. *See Khalifa v. Henry Ford Hospital*, 156 Mich. App. 485 (1986); *Dickerson v. Nichols*, 161 Mich. App. 103 (1987). Likewise, the Sixth Circuit has also recognized the tort under Michigan law. *Pratt v. Brown*, 855 F.2d 1225 (6th Cir. 1988). Courts which have recognized the tort have held liability only where the defendent's conduct is extreme and outrageous:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice', or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

Roberts, 422 Mich. at 597 citing Restatement Torts, 2d § 46 comment d, pp. 72-73.

Plaintiff alleges that defendant knew she was susceptible to emotional distress if she was not placed in a "non-threatening environment." Plaintiff submits she was given inadequate training and then placed in a position with inadequate guidance. Thereafter she was unjustly placed on an improvement plan which defendant knew plaintiff could not meet.

The Court first notes the lack of factual support for plaintiff's claims. Nonetheless, assuming all of the above to be true, defendant's conduct amounts to mere negligence and does not constitute conduct which is outrageous in character, extreme in degree and goes beyond all bounds of decency such that it may be regarded as atrocious. Accordingly, the Court finds plaintiff's claim of intentional infliction of emotional distress to be without merit.

D. PLAINTIFF CANNOT ESTABLISH A BREACH OF CONTRACT ARISING OUT OF THE FAILURE TO PAY COMMISSIONS

Plaintiff claims to be entitled to commissions arising out of three specific sales: (1) products sold to Davidson-Gotschall in 1982; (2) products sold to F. Joseph Lamb in 1983; and (3) products received by Barton-Malow in 1983.

The undisputed facts indicate that IBM paid commission upon the installation and not the sale of equipment. Plaintiff did not receive commissions on the Davidson-Gotschall sale and F. Joseph Lamb sale because she was reassigned out of that sales territory before product installation. Plaintiff testified she had received commissions for equipment installed in her newly assigned territory despite the fact that plaintiff did not make the sale.

As for the equipment used by Barton-Malow, plaintiff was informed that the equipment was purchased and owned by General Motors. Since General Motors was not in plaintiff's territory, she was not entitled to a commission.

Based upon the undisputed facts, the Court cannot find a breach of contract arising out of the nonpayment of commissions allegedly due.[9]

CONCLUSION

For all the reasons stated in this Opinion the Court GRANTS defendant's motion for summary judgment.

IT IS SO ORDERED.

/s/ L. P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

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[9] The Court notes that plaintiff's brief in response to defendant's motion for summary judgment does not even address defendant's arguments regarding Count Three, breach of contract arising out of sales commissions alleged to be due and owing. Thus, the motion is unopposed as to Count Three.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 88-CV-72299-DT

HONORABLE LAWRENCE P. ZATKOFF

ROSALIND MERRIWEATHER,

Plaintiff,

vs.

INTERNATIONAL BUSINESS MACHINES,
a foreign corporation,

Defendant.

A TRUE COPY

CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

BY /s/ R. P. Nastwold
DEPUTY CLERK

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 10th day of August, 1989.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

This lawsuit involves an employment dispute between plaintiff and defendant, her former employer. On May 10, 1989, this Court granted defendant's motion for summary judgment finding that plaintiff released IBM from all li-

ability arising from her employment when plaintiff redeemed her workers' compensation claim. The Court also considered the merits of plaintiff's claims but found that plaintiff failed to present evidence sufficient to make a prima facie case on any of her claims.

Currently before the Court is plaintiff's motion for reconsideration of this Court's Memorandum Opinion and Order dated May 10, 1989. The Court requested that defendant respond to plaintiff's motion. Having read the briefs and considered all the arguments, the Court hereby DENIES plaintiff's motion for reconsideration.

In a motion for reconsideration, the movant must demonstrate the existence of a palpable defect by which the Court and parties had been mislead. The movant must also demonstrate that correction of the defect would result in a different disposition of the case. E.D. Mich. Local Rule 17(m)(3). Motions for reconsideration that merely present issues already ruled upon by the Court must be denied. *Id.*

Plaintiff has presented new evidence which supports the conclusion that plaintiff's Workers' Compensation Redeemption Agreement was intended to apply only to plaintiff's workers' disability claim of job induced stress. Had the Court been apprised of this evidence, it may have ruled differently on the issue of whether plaintiff released defendant from all job-related liability. This case was not resolved, however, solely upon the waiver of liability resulting from the redemption of plaintiff's workers' compensation claim. The Court also found that plaintiff failed to present evidence sufficient to make a prima facie showing on any of her claims. Plaintiff's brief in support of reconsideration does not present any new evidence to support her claims. Plaintiff's brief in support of reconsideration merely reargues issues already ruled upon by the Court.

For the reasons stated herein, as well as all those set forth in defendant's response to plaintiff's motion for reconsideration, the Court finds that a different disposition of this case in not required by the evidence presented by plaintiff. Accordingly, plaintiff's motion for reconsideration is DENIED.

/s/ L. P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Pursuant to Rule 77(d), FRCivP
COPIES HAVE BEEN MAILED TO THE
FOLLOWING:
Atty Lionel Postic
Atty. Joseph A. Ritok, Jr.
Atty Lauren A. Rousseau
on Aug 10, 1989
/s/ R. P. Nastwold
DEPUTY CLERK

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 89-CV-71499-DT

HON. LAWRENCE P. ZATKOFF

ROSALIND MERRIWEATHER,

Plaintiff,

vs.

INTERNATIONAL BUSINESS MACHINES, a foreign corporation, EUGENE KENNEDY, an individual, and HUGH JEFFERSON RAY, an individual, Jointly and Severally,

Defendants.

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 12th day of February, 1990.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

This matter is currently before the Court on defendant's motion for summary judgment. Plaintiff has responded and the Court now makes its ruling.

PROCEDURAL HISTORY

This lawsuit involves an employment dispute between plaintiff and defendant, her former employer. Plaintiff is a Michigan resident. Defendant, International Business Machines (IBM), is a New York corporation with its prin-

cipal place of business in New York. IBM maintains sales offices in the State of Michigan. Plaintiff was terminated from employment by IBM on September 4, 1987, after having worked for the defendant since 1976.

On May 10, 1988, as a result of her termination, plaintiff brought suit against IBM claiming racial discrimination, intentional infliction of emotional distress and failure to pay sales commissions due her. That suit gave rise to *Merriweather v. IBM*, Civil Action Number 88-CV-72299-DT, (hereafter referred to as Merriweather I).

Later, plaintiff attempted to add a *Tcussaint* claim for wrongful termination of employment. This Court did not allow the addition of this claim to plaintiff's complaint for the reasons set forth in its March 9, 1989 Memorandum Opinion and Order. The parties had explicitly agreed that no additional claims would be added, but plaintiff attempted to add the *Toussaint* claim at a very late date. The Court found undue delay in plaintiff's effort to amend the complaint. Therefore, pursuant to Fed. R. Civ. P. 15, the Court denied plaintiff's request to amend and held the parties to their earlier agreement that no additional claims would be added. Plaintiff appealed this Court's denial of plaintiff's motion to amend. That appeal is still pending.

On May 10, 1989, this Court granted IBM's motion for summary judgment. Based upon the facts, the Court found that plaintiff could not establish her claims of racial discrimination, intentional infliction of emotional distress and failure to pay sales commissions due her.

On April 20, 1989, several weeks prior to the Court's ruling granting defendant's motion for summary judgment, plaintiff filed this second suit against IBM in the Wayne County Circuit Court (hereafter referred to as Merriweather II). Plaintiff's complaint alleged wrongful termination and intentional interference with an economic relationship. In Merriweather II, plaintiff brought suit against IBM and also added defendants Eugene Kennedy

and Hugh Jefferson Ray. These two Michigan residents were employed by IBM and were supervisors of the plaintiff.

Defendants removed Merriweather II from Wayne County Circuit Court to this Court. However, plaintiff moved for remand back to state court alleging that diversity had been destroyed through the joinder of defendants Ray and Kennedy. Defendants argued that Ray and Kennedy had been fraudulently joined in order to defeat the diversity jurisdiction of this Court. According to defendants, plaintiff had no claim against the individual defendants and, therefore, this Court could not remand the case to state court.

In its Memorandum Opinion and Order of September 22, 1989, this Court denied plaintiff's motion to remand to state court. For the reasons stated in that opinion, this Court found that no genuine issues of material fact existed as to whether defendants Ray and Kennedy intentionally interfered into plaintiff's business or economic relationship with IBM. (See September 22, 1989, Opinion at pp. 7-11). Because plaintiff's claims against the non-diverse defendants (Ray and Kennedy) were capable of summary judgment, this Court concluded that remand was not appropriate. (See *Spence v. Flynt*, 647 F.Supp. 1266, 1271 (D. Wyo. 1986)). As a result, this Court has jurisdiction over the Merriweather II lawsuit.

FACTS

Before addressing the defendants' motion for summary judgment in Merriweather II, the Court will set forth the same facts as developed in previous opinions.

Plaintiff began working for IBM in 1976 as an account marketing representative trainee. After training, she was assigned a quota and sales territory. Her performance was satisfactory through 1980.

In 1981, plaintiff's only child died and her marriage ended in divorce. According to her own deposition, plaintiff could no longer perform her job duties as effectively and successfully as she had in the past. (Deposition of Rosalind Merriweather, pg. 213).

In 1982 and 1983, plaintiff did not meet her sales quotas and she received performance evaluations which were at the low end of satisfactory.

In 1984, plaintiff was assigned a new marketing manager, Margo Eurick, and a new sales territory. Plaintiff was provided with a document entitled "1984 Last Half Action Plan," which specifically outlined how plaintiff needed to perform to meet her 1984 goals. *Id.* at 166. Plaintiff claims her sales territory at that time was too small to enable her to meet her sales goals, but cannot remember requesting additional territory. *Id.* at 162, 186.

Between October and December of 1984, plaintiff was on sick leave. During that time she filed an "open door" complaint with IBM management claiming she was treated unfairly by Eurick. IBM's open door complaint is an internal grievance procedure which allows salaried employees to complain to upper management about working conditions or job treatment. Joseph Stanko investigated the complaint and determined that plaintiff's claims were invalid and that IBM had treated her fairly.

IBM then took plaintiff out of the sales force, off quota requirements and placed her into a six-month re-education program which she started after returning to work from her sick leave. *Id.* at 196.

For the first six months of 1985, plaintiff's only job duty was to prepare for and attend retraining classes. *Id.* at 200. She had no sales territory and no sales quotas to meet. Plaintiff was scheduled to return to the regular sales force in June of 1985, but again claimed sick leave due to her emotional state. *Id.* at 220-222.

In April of 1986, she returned to work and was placed in IBM's Detroit Renaissance Center office. Her new position was that of an overlay software representative in training. Plaintiff was placed under the supervision of marketing manager Hugh Jefferson Ray. The branch manager of the Renaissance branch was Eugene Kennedy. Plaintiff's new position was designed to greatly reduce the stress of a full sales quota position. Under her new position, plaintiff would receive credit for each sale made by the branch. In other words, plaintiff could achieve her quota, in part, by receiving credit for the quotas obtained by the entire branch. *Id.* at 311.

In April of 1986, plaintiff was given a performance plan which required five more months of training. She was required to learn more about IBM's products and marketing techniques. During this training period, she met with account marketing representatives from her branch and eventually escorted them on customer calls. In September of 1986, she assumed full duties as overlay software representative. She also received a written evaluation from Ray which gave her a low, but satisfactory, rating.

The evaluation provided in part:

> **OFFICE SKILLS DEVELOPMENT**
>
> While Roz attended classes that specialized in office systems, she recognizes a need to enhance her DISOSS and PC software skills. She has not demonstrated her understanding of connectivity to her manager. . . . Roz is aware that her technical credibility is key to her success and has an action plain in place to develop her proficiency immediately.
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> . . . While [Roz] was expected to prove herself through at least three formal demos and pres-

> entations, she only completed one formal presentation on AS and one informal presentation of AS in a call at AAA. Roz understands demos and presentations are an intrinsic part of the successful sell cycle. . . .

The evaluation recognized three areas that needed improvement: (1) initiative in closing business; (2) enhancement of office technical skills; and (3) meeting commitments to management. The evaluation was received and reviewed by defendant Kennedy.

From September to December, 1986, plaintiff's performance was sub-par. Plaintiff's lack of product and marketing knowledge caused the account marketing representatives to avoid utilizing her assistance. Marketing Manager Steve Miltenberger documented some of the complaints received from account marketing representatives in a memo to plaintiff's supervisor, Ray, dated November 6, 1986. The memo stated that plaintiff's product knowledge was very weak and that plaintiff often requested meetings to cover material discussed in previous meetings. Miltenberger stated he was concerned about the credibility of the entire account team. In December, 1986, Ray informed plaintiff that if she did not improve her performance she would receive an unsatisfactory rating on her next formal evaluation.

On April 2, 1987, plaintiff received an unsatisfactory performance evaluation from Ray. The evaluation indicated plaintiff failed to meet job expectations in the areas of customer plans and programs, territory objectives and professional responsibilities. The evaluation was summarized as follows:

> Roz is a positive and eager member of the branch. Her efforts must, however, be weighed against her results and contribution. She has not met her marketing objectives. She has not been an active participant and contributor to a win and was not

> at all involved in a key loss. She does not understand the realistic opportunity in the office and is not conversant with current marketing situations. She has not maintained a working plan of her accounts. She has not developed an Executive Education Plan. Her peer credibility continues to suffer based on lack of product knowledge and effective use of their time. She must improve in her use of resources. Her leadership has not been demonstrated in a successful marketing effort. She is respected for her positive "Can Do" attitude and sincere desire for improvement, but is not meeting the requirements of the job. Roz's overall performance does not meet the requirements of the job.

After receiving her April, 1987, evaluation, plaintiff filed her second open door complaint. Again, she alleged unfair treatment. George DeCou was assigned to investigate the complaint and concluded that plaintiff had been treated fairly. Thereafter, plaintiff was placed on a ninety-day improvement plan. Id. at 370.

The improvement period commenced on May 22, 1987. Plaintiff was provided a six-point marketing objective plan that required:

1. Identification of five marketing opportunities in the 90-day period;
2. Qualify opportunities with input from branch reps and marketing management;
3. Develop effective marketing strategies with the objective of selling and/or installing product identified in plaintiff's five marketing opportunities by August 31, 1987;
4. Identification of milestones for above mentioned strategies that allow for the closing of business by August 31, 1987;

5. Meet milestone dates; and

6. Make plan changes with management concurrence.

The plan outlined territory objectives and professional responsibilities. The plan also provided that:

> [f]ailure to satisfactorily complete any phase of the improvement plan or failure to demonstrate immediate marked and sustained improvement during the improvement period will result in your termination from IBM at any time during the improvement period.

During the improvement period, Ray stressed the importance of closing sales within the ninety-day period. *Id.* at 384. Ray also referred plaintiff to an IBM system engineer in order to improve her forecasting abilities. *Id.* at 378. Pursuant to the improvement plan, plaintiff identified five clients, but changed the prospective list several times during the improvement period. *Id.* at 415-420. Near the end of the ninety-day improvement period, plaintiff told Ray that she could find no sales opportunities in her territory.

In July of 1987, Ray met with plaintiff for an informal review of her performance. Ray told plaintiff she was not meeting the goals of the plan and discussed with her the steps that needed to be taken to improve her performance. Her performance did not improve and on September 4, 1987, plaintiff received a formal performance evaluation of unsatisfactory. As a result, plaintiff was terminated from her employment. *Id.* at 435.

LAW

Summary judgment is appropriate where no genuine issue of material fact remains to be decided and the moving party is entitled to judgment as a matter of law. *Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1986); Fed.

R. Civ. P. 56(c). "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). In applying this standard, the Court must view all materials offered in support of a motion for summary judgment, as well as all pleadings, depositions, answers to interrogatories, and admissions properly on file in the light most favorable to the party opposing the motion. *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986); *United States v. Diebold*, 368 U.S. 654 (1962); *Cook v. Providence Hosp.*, 820 F.2d 176, 179 (6th Cir. 1987); *Smith v. Hudson*, 600 F.2d 60 (6th Cir. 1979), *cert. dismissed*, 444 U.S. 986 (1979). In deciding a motion for summary judgment, the Court must consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52, 106 S.Ct. at 2512. Although summary judgment is disfavored, this motion may be granted when the trial would merely result in delay and unneeded expense. *Poller v.Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491 (1962); *A.I. Root Co. v. Computer/Dynamics, Ind.*, 806 F.2d 673, 675 (6th Cir. 1986). Where the non-moving party has failed to present evidence on an essential element of their case, they have failed to meet their burden and all other factual disputes are irrelevant; thus, summary judgment is appropriate. *Celotex*, 477 U.S. at 322-23, 106 S.Ct. at 2552; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 586, 106 S.Ct. 1348, 1356 (1986)("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." (Footnote omitted)).

Defendants claim that the doctrines of *res judicata* or collateral estoppel act to bar plaintiff's claims in Merriweather II. In the alternative, defendants claim that plaintiff cannot establish facts to support her allegations of wrongful termination and intentional interference into her economic relationship with IBM. Therefore, defendants have moved for summary judgment. The Court will examine each of these asserted reasons for summary judgment individually.

RES JUDICATA

The doctrine of *res judicata* acts as a bar to a subsequent action where the following requirements are satisfied. The two actions must be between the same parties, the former action must have been decided on the merits and the same matter contested in the second action must have been decided in the first. *Ward v. DAIIE*, 115 Mich. App. 30 (1982). Michigan case law also suggests that *res judicata* effects claims that were actually litigated as well as claims arising out of the same transaction which plaintiff could have brought, but did not. *Carter v. SEMTA*, 135 Mich. App. 261 (1984); *Gose v. Monroe Auto Equipment Co.*, 409 Mich. 147 (1980).

Defendants submit that with respect to plaintiff's wrongful termination claim, these requirements have been met. The parties are the same as Merriweather I. Plaintiff's suit is against defendant IBM. In addition, defendants claim that a suit for termination because of discrimination would bar, on grounds of *res judicata*, a subsequent suit for breach of employment contract because the two causes of action arose from the same transaction or out of the same discharge of employment. *Carter*, 135 Mich. App. at 264. Also, defendants claim that this Court's prior ruling, granting IBM's motion for summary judgment in Merriweather I, is a final decision on the merits. *Adkins v. Allstate Insurance Co.*, 729 F.2d 974, 976 (4th Cir. 1984). Therefore, defendants argue that their motion for summary

judgment should be granted because Merriweather II involves the same parties and the same matter that was already adjudicated in Merriweather I.

With respect to plaintiff's claim of intentional interference into her economic relationship with IBM, defendants' argument is essentially the same. Defendants claim that *res judicata* also applies to that claim because the matter was already decided in Merriweather I. According to defendants, the joinder of Ray and Kennedy does not destroy the requirement of identical parties because Ray and Kennedy are in privity to defendant IBM.

Res judicata may in fact be applicable in this instance. However, this Court is hesitant to grant defendants' motion solely on grounds of *res judicata* because of the fact that some dispute exists regarding whether or not Merriweather II actually alleges the same cause of action as Merriweather I. In any event, defendants' motion can be granted on grounds of collateral estoppel. While these two doctrines are related, collateral estoppel is more applicable in this instance.

COLLATERAL ESTOPPEL

Under collateral estoppel, once an issue is determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. *Montana v. United States*, 440 U.S. 147, 153 (1979).

In Merriweather I, issues of fact were resolved against the plaintiff. Those same issues are now the basis of plaintiff's complaint in Merriweather II. Specifically, this Court has already determined that plaintiff was not wrongfully discharged, but rather discharged for poor work performance. Plaintiff, however, argues that the resolution of Merriweather I did not require this Court to determine whether plaintiff was wrongfully discharged or employed under a just cause employment agreement. According to

plaintiff, these issues did not need to be considered in order to determine if plaintiff's discharge was tainted by racially discriminatory motives. (Plaintiff's response to defendants' motion for summary judgment, pp. 11-12). In addition, plaintiff claims that a question of material fact exists as to whether plaintiff was discharged for just cause.

Plaintiff's argument is without merit. The Court cannot make a determination as to whether plaintiff was discharged for discriminatory reasons without considering the fact that plaintiff must have been terminated for some reason. Moreover, in Merriweather I, plaintiff brought her own work performance into question. Plaintiff raised the issue of her job performance by alleging that she had established a prima facie case of discrimination because she had been discharged despite the fact that she was qualified. (See Memorandum Opinion and Order in Merriweather I, May 10, 1989, pg. 15).

As a result, the Court had to consider plaintiff's job performance in determining whether her termination was racially tainted or based on some other reason. The Court concluded that her termination was not racially motivated. Despite plaintiff's assertion that she was qualified, the Court concluded that plaintiff was terminated as the result of her poor performance evaluations and her inability to perform her job. This Court found:

> The undisputed facts indicate plaintiff was not qualified. While plaintiff completed her training program she simply was unable to apply the knowledge she received. Plaintiff does not dispute her inability to forecast potential sales, nor that she was not involved in a significant sale during her employment at the Renaissance Branch office. Likewise, plaintiff cannot rebut the fact that other employees complained about her performance, and that her performance evaluations were below par. Plaintiff reached her quota

> due to overall branch sales. There is no question that plaintiff was unable to contribute to the branch sales effort.

In Merriweather I this Court concluded that plaintiff had not been wrongfully terminated because of her race. Instead, her termination was the result of poor job performance. Therefore, this Court concludes that plaintiff is collaterally estopped from claiming wrongful termination in Merriweather II. That specific issue was decided against plaintiff in Merriweather I.

With regard to plaintiff's claim that defendants Ray and Kennedy intentionally interfered in her economic relationship with IBM, the Court concludes that collateral estoppel also precludes defendants from raising this issue in Merriweather II. In plaintiff's motion for Remand of Merriweather II back to state court, plaintiff argued that defendants Ray and Kennedy "set about to have Meriweather discharged because of discrimination against her because of her race." (Plaintiff's motion to remand case to state court, pg. 2).

In Merriweather I, this Court ruled that plaintiff had failed to show she was treated differently because of her race. In fact, the Court's opinion noted that in her deposition, plaintiff said she did not believe she was treated differently because of her race. (Memorandum Opinion and Order, May 10, 1989, pg. 15). Therefore, this Court finds that defendants Ray and Kennedy did not intentionally interfere into plaintiff's economic relationship with IBM because of any racial animus.

NO GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER RAY AND KENNEDY INTENTIONALLY INTERFERED WITH PLAINTIFF'S ECONOMIC RELATIONSHIP

To the extent that plaintiff's claim against the individual defendants is not based solely on alleged racial animus,

and therefore, possibly not barred by collateral estoppel, the Court finds that defendants' motion should still be granted. In order to succeed on her claim against Ray and Kennedy, plaintiff must show they were acting for their personal benefit and for an illegal, unethical or fraudulent reason. *Formall v. Community National Bank*, 166 Mich. App. 772, 779 (1988); *Stack v. Marcum*, 147 Mich. App. 756, 760 (1985). The facts in the record indicated that plaintiff could not succeed on her claim against the individual defendants.

After plaintiff moved to remand Merriweather II back to state court, defendants asserted that Ray and Kennedy had been fraudulently joined to defeat the diversity jurisdiction of this Court. In order to rule on plaintiff's motion to remand, the Court had to determine if plaintiff's claims against Ray and Kennedy were capable of summary judgment. *Spence v. Flynt*, 647 F.Supp. 1266, 1271 (D. Wyo. 1986). If plaintiff's claims were capable of summary judgment, then the Court could not remand.

In this instance, the Court concluded that the facts failed to support plaintiff's claim of intentional interference with an economic relationship. This Court found that:

> . . . the record indicates that neither Ray nor Kennedy behaved improperly toward the plaintiff. Ray regularly reviewed with plaintiff her progress and failings, and made suggestions as to how plaintiff could improve her performance. Deposition of Ray, pg. 133, 137). In addition to suggestions, plaintiff received periodic evaluations, advise from a forecasting expert, eleven months of training and performance plans. This was not all done to program plaintiff's failure, but rather as a means to increase her knowledge of IBM's products and improve her sales skills. (Despite these efforts, plaintiff's performance remained substandard. (*Id.* at 130).

* * *

> Likewise, no genuine issue of material fact exists as to whether or not Ray and Kennedy acted solely to further their own personal interests. Plaintiff was not treated arbitrarily by defendants Ray and Kennedy. Before Ray placed plaintiff on the ninety-day improvement plan, he received the approval of Kennedy and IBM's personnel management staff. (Deposition of Ray, pg. 143). The decision to terminate plaintiff's employment was also made by Ray and Kennedy only after receiving the concurrence of IBM's personnel management staff. (Deposition of Kennedy at pg. 56).
>
> Under IBM's sales structure, Ray and Kennedy had nothing to personally gain by programming plaintiff to fail. As supervisor and branch manager, respectively, defendants were assigned an annual sales quota which was then ultimately distributed to the marketing representatives. Whether or not defendants reached their assigned quotas depended to a large extent on the success of all the sales representatives at the Branch. (Deposition of Ray at pg. 47). Performance plans and improvement plans designed to cause failure could have had detrimental impact on the individual evaluations and earnings of both Ray and Kennedy. These facts show that defendants did not act improperly or for their own personal motives. Instead, their attempt to improve plaintiff's performance and their decision to terminate her employment were decisions which were reviewed by IBM's personnel management staff and approved as actions taken in IBM's best interest.

(Memorandum Opinion and Order, September 22, 1989, pp. 9-11).

Therefore, to the extent plaintiff's claim against Ray and Kennedy is not barred by collateral estoppel, the Court finds that no genuine issues of material fact exist as to whether Ray and Kennedy intentionally interfered in plaintiff's economic relationship with IBM.

CONCLUSION

Based on all the foregoing, this Court hereby GRANTS defendants' motion for summary judgment.

IT IS SO ORDERED.

/s/ L. P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 89-CV-71499-DT

HON. LAWRENCE P. ZATKOFF

ROSALIND MERRIWEATHER,

Plaintiff,

vs.

INTERNATIONAL BUSINESS MACHINES, a foreign corporation, EUGENE KENNEDY, an individual, and HUGH JEFFERSON RAY, an individual, Jointly and Severally,

Defendants.

A TRUE COPY

CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

BY /s/ R. P. Nastwold

JUDGMENT

IT IS ORDERED AND ADJUDGED that this action is hereby DISMISSED pursuant to the Memorandum Opinion and Order dated February 12, 1990.

Dated at Detroit, Michigan, this 12th day of February, 1990.

DAVID R. SHERWOOD
CLERK OF THE COURT

BY: /s/ R. P. Nastwold

APPROVED:

/s/ L. P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

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Atty Lionel J. Postic

on Feb 12, 1990
/s/ R. P. Nastwold
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APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 88-CV-72299-DT

HONORABLE LAWRENCE P. ZATKOFF

ROSALIND MERRIWEATHER,

Plaintiff,

vs.

INTERNATIONAL BUSINESS MACHINES,
a foreign corporation,

Defendant.

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CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

BY/s/ R. P. Nastwold
DEPUTY CLERK

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 8th day of May, 1989.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

This suit involves an employment dispute wherein plaintiff alleges a breach of contract, racial discrimination and intentional infliction of emotional distress.

During the course of discovery, defendant objected to certain interrogatories seeking the following information:

1. "Open Door" complaints made by any employee or former employee of the Renaissance Branch Office concerning racial discrimination or incidents of racial hostility within specified years (Fourth Set of Interrogatories Nos. 5-9).

2. Complaints of racial discrimination filed with the Equal Employment Opportunity Commission by any employee or former employee of the Renaissance Center Branch within specified years (Fourth Set of Interrogatories Nos. 33-37).

3. Lawsuits filed against IBM alleging wrongful termination or race discrimination within specified years (Fourth Set of Interrogatories Nos. 4, 38-52).

4. A list of other employees of Defendant who held the same position as plaintiff (Fourth Set of Interrogatories Nos. 10- 23).

Plaintiff filed a motion to compel which was referred to United States Magistrate Virginia M. Morgan. After reading the brief and entertaining oral argument on the issue, the Magistrate denied plaintiff's motion to compel.[1]

Currently before the Court is Plaintiff's objection to a Discovery Order rendered by the Magistrate on April 7, 1989.

A district court may reconsider a magistrate's discovery order only where it has been shown the order is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A); E.D. Mich. Local Rule 4-C(a). A finding is clearly erroneous when, after reviewing the record in its entirety, the reviewing court is left with a definite and firm conviction

[1] The Magistrate required IBM to provide copies of any EEOC complaints made against plaintiff's branch supervisors, but denied the motion in all other respects.

that a mistake has been made. *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948).

Plaintiff submits the Magistrate's Order is clearly erroneous because defendant failed to provide proof that the objections to the interrogatories were meritorious. Plaintiff argues defendant has failed to show why each question is not relevant or how each question is overbroad, oppressive or burdensome. *E.g. Trabon Engineering Corp. v. Easton Mfg. Co.*, 37 F.R.P. 51, 54 (N.D. Ohio 1964).

The Court is not persuaded by plaintiff's argument. After reviewing defendant's brief in response to the motion to compel, the Court finds defendant sufficiently provided the reasons why the interrogatories are objectionable. Specifically, the interrogatories seek information about current and former employees not similarly situated to plaintiff. Further, plaintiff seeks information about persons who are not parties to this litigation. Thus the information is irrelevant. The interrogatories are overbroad in that they seek information beyond the limitations period. One interrogatory is overbroad in that it seeks information concerning wrongful termination suits filed by former employees notwithstanding the fact that plaintiff does not allege a similar claim.

Additional reasons are set forth in defendant's brief in opposition to the motion to compel. Based upon the above mentioned reasons, as well as those set forth in defendant's brief in opposition, the Court finds that the Magistrate's Discovery Order was not clearly erroneous or unfounded in the law. Accordingly, the Court finds plaintiff's objections to be without merit.

This matter shall proceed to trial as scheduled on the Court's June, 1989 trailing docket.

IT IS SO ORDERED.

/s/ L. P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

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on May 8, 1989
/s/ R. P. Nastwold
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APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 88-CV-72299-DT

HONORABLE LAWRENCE P. ZATKOFF

ROSALIND MERRIWEATHER,

Plaintiff,

vs.

INTERNATIONAL BUSINESS MACHINES,
a foreign corporation,

Defendant.

A TRUE COPY

CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

BY/s/ R. P. Nastwold
DEPUTY CLERK

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 9th day of March, 1989.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

This lawsuit involves an employment dispute between plaintiff and her former employer. Before the Court is plaintiff's motion for leave to amend her complaint pursuant to Fed. R. Civ. P. 15. Amendments under Rule 15

are at the discretion of the Court. Leave to amend should be freely given when justice so requires. Leave to amend should always be granted in the absence of a specific reason to the contrary, such as undue delay, bad faith, dilatory motive, undue prejudice to the opposing party or futility of the amendment. *Foman v. Davis*, 371 U.S. 178 (1962); *Mark v. Centran Corp*, 747 F.2d 1536 (6th Cir. 1984); *Epsey v. Wainwright*, 734 F.2d 748, 750 (11th Cir. 1984).

Plaintiff seeks to add a *Toussaint* claim for wrongful termination of employment. Plaintiff's motion for leave to amend provides, in pertinent part, "[d]uring the course of discovery, plaintiff's counsel learned that defendant had a policy and practice of terminating its employees, including plaintiff, only when it had good cause to do so." Motion for leave to amend, para. 3. Plaintiff implies the policy was not known to plaintiff or her counsel prior to discovery. This implication, however, is contrary to the allegations of plaintiff's proposed amended complaint, which provides at paragraph 37 that "[a]s a result of defendant's communications to plaintiff, plaintiff formed a legitimate expectation that she could be terminated only when good cause existed for the termination."

Accepting the allegations of the proposed amended complaint as true, it is clear that plaintiff was aware of and relied upon the defendant's policies and practices prior to being terminated. Since this lawsuit involves an employment dispute, plaintiff's *Toussaint* claim should have been discovered prior to the filing of the complaint. Plaintiff offers no justifiable reason for the delay.

In addition, plaintiff's motion is contrary to representations previously made to the Court. On July 26, 1988, this Court held scheduling conference on this matter as required by Fed. R. Civ. P. 16(b). As stated in Rule 16(b) and in the Court's notice of scheduling conference, the parties were instructed to be prepared to discuss various

procedural matters. One of the purposes to the scheduling conference was to discuss amendments to the pleadings. Under Rule 16(b)(1), the Court may enter an Order that limits the time to amend pleadings to add parties and claims. After discussing the matter with the Court, the parties explicitly agreed that no additional claims would be added.

Since plaintiff agreed no claims would be added and finding undue delay in seeking leave to amend the complaint, plaintiff's motion is denied.

IT IS SO ORDERED.

/s/ L. P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

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Atty. Lauren A. Rousseau
on March 9, 1989
/s/ R. P. Nastwold
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APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 88-CV-72299-DT

HONORABLE LAWRENCE P. ZATKOFF

ROSALIND MERRIWEATHER,

Plaintiff,

vs.

INTERNATIONAL BUSINESS MACHINES,
a foreign corporation,

Defendant.

A TRUE COPY

CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

BY /s/ R. P. Nastwold
DEPUTY CLERK

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 6th day of April, 1989.

PRESENT THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Before the Court in plaintiff's motion for reconsideration of this Court's Order of March 9, 1989, wherein plaintiff's motion for leave to amend her complaint was denied.

In a motion for reconsideration, the movant must demonstrate: (1) a palpable defect by which the Court and parties

have been misled; and (2) a different disposition of the matter must result from correction thereof. E.D. Mi. Local Rule 17(M)(3). Motions for reconsideration that present the same issues already ruled upon by the Court either expressly or by reasonable implication will not be granted. *Id.*

Plaintiff submits the Court's denial of leave to amend is contrary to prevailing Sixth Circuit law. Plaintiff relies upon *Janikowski v. Bendix Corp.*, 823 F.2d 945, 951-952 (6th Cir. 1987) to support her proposition. This Court is not persuaded by plaintiff's argument.

Unlike *Janikowski*, plaintiff at bar did not move to amend until after the close of discovery. In addition, the Court considered the following facts before denying leave to amend:

> (1) the request for leave to amend came nearly eight months after the lawsuit was filed and not until the cut-off date set for the filing of dispositive motions;
>
> (2) the amendment pleads a new and distinct cause of action that would require additional discovery and responsive pleading;
>
> (3) the new cause of action should have been discovered by plaintiff's counsel had counsel conducted a reasonable prefiling investigation of the factual and legal support to plaintiff's possible claims;
>
> (4) plaintiff asserts the claim was discovered during discovery but nonetheless waited until discovery was closed before seeking leave to amend; and
>
> (5) that plaintiff's counsel expressly stated to the Court during a pretrial scheduling conference that no new claims would be added (see Exhibit 'A' attached).

From these facts the Court found undue delay in bringing the motion. The Court further found that defendant would suffer undue prejudice should leave to amend be granted. In addition, the Court notes the complete absence of any legitimate reason

why the amendment was not requested in a more timely fashion. The absence of legitimate sound reasons to support the motion to amend give rise to an inference of a dilatory motive on the part of plaintiff.

The policy that amendments should be freely given "reinforce[s] the principle that cases should be tried on their merits rather than on technicalities of pleading." *Teff v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982). This policy is not served when Rule 15 is used as a vehicle to protract litigation, increase the costs of defense and induce settlement of a suit before a defendant is afforded an opportunity to have the case tried on its merits.

For these reasons, the Court hereby DENIES plaintiff's motion for reconsideration and DENIES plaintiff's request to certify this issue for immediate appeal.

IT IS SO ORDERED.

/s/ L. P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

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Atty Lauren A. Rousseau
Atty Joseph A. Golden
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on April 6, 1989
/s/ R. P. Nastwold
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APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 89-CV-71499-DT

HONORABLE LAWRENCE P. ZATKOFF

ROSALIND MERRIWEATHER,

Plaintiff,

vs.

INTERNATIONAL BUSINESS MACHINES, a foreign corporation, EUGENE KENNEDY, an individual, and HUGH JEFFERSON RAY, an individual, Jointly and Severally,

Defendant.

A TRUE COPY

CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

BY/s/ R. P. Nastwold
DEPUTY CLERK

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 22nd day of September, 1989.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

This case is currently before the Court on plaintiff's motion to remand to state court. The underlying lawsuit involves an employment dispute between plaintiff and defendant, her former employer. Plaintiff is a resident of

Michigan. Defendant, International Business Machines (IBM), is a New York corporation with its principal place of business in New York. IBM maintains sales offices in the State of Michigan. Plaintiff was terminated from employment by IBM on September 4, 1987, after having worked for the defendant since 1976.

On May 10, 1988, as a result of her termination, plaintiff brought suit against IBM claiming discrimination, intentional infliction of emotional distress and failure to pay sales commissions due her. That suit gave rise to *Merriweather v. IBM*, Civil Action Number 88-CV-72299-DT, (hereafter referred to as Merriweather I). On May 10, 1989, this Court, by Memorandum Opinion and Order, ruled that plaintiff could not establish her claims based on the facts. Therefore, this Court granted IBM's motion for summary judgment.

On April 20, 1989, plaintiff filed this second action against IBM in the Wayne County Circuit Court. Her complaint alleged wrongful termination and intentional interference with an economic relationship. On May 11, 1989, defendants petitioned for removal from the Circuit Court for the County of Wayne, State of Michigan. The defendants based jurisdiction on the diversity of citizenship between the parties. According to the defendants, plaintiff fraudulently joined defendants Eugene Kennedy and Hugh Jefferson Ray, both Michigan residents, for the purpose of avoiding removal. (Defendants' Petition for Removal, pg. 3). Plaintiff's motion to remand the case to state court was filed July 27, 1989. Defendants have responded and the motion is now ripe for disposition.

FACTS

The second law suit arises out of the same facts and circumstances which gave rise to Merriweather I. Both sides have relied on the facts as developed for Merri-

weather I. Therefore, those facts will be set forth here as follows:

Plaintiff began working for IBM in 1976 as an account marketing representative trainee. After training, she was assigned a quota and sales territory. Her performance was satisfactory through 1980.

In 1981, plaintiff's only child died and her marriage ended in divorce. According to her own deposition, plaintiff could no longer perform her job duties as effectively and successfully as she had in the past. (Deposition of Rosalined Merriweather, pg. 213).

In 1982 and 1983, plaintiff did not meet her sales quotas and she received performance evaluations which were at the low end of satisfactory.

In 1984, plaintiff was assigned a new marketing manager, Margo Eurick, and a new sales territory. Plaintiff was provided with a document entitled "1984 Last Half Action Plan," which specifically outlined how plaintiff needed to perform to meet her 1984 goals. *Id.* at 166. Plaintiff claims her sales territory at that time was too small to enable her to meet her sales goals, but cannot remember requesting additional territory. *Id.* at 162, 186.

Between October and December of 1984, plaintiff was on sick leave. During that time she filed an "open door" complaint with IBM management claiming she was treated unfairly by Eurick. IBM's open door complaint is an internal grievance procedure which allows salaried employees to complain to upper management about working conditions or job treatment. Joseph Stanko investigated the complaint and determined that plaintiff's claims were invalid and that IBM had treated her fairly.

IBM then took plaintiff out of the sales force, off quota requirements and placed her into a six-month re-education program which she started after returning to work from her sick leave. *Id* at 196.

For the first six months of 1985, plaintiff's only job duty was to prepare for and attend retraining classes. *Id.* at 200. She had no sales territory and no sales quotas to meet. Plaintiff was scheduled to return to the regular sales force in June of 1985, but again claimed sick leave due to her emotional state. *Id.* at 220-222.

In April of 1986, she returned to work and was placed in IBM's Detroit Renaissance Center office. Her new position was that of an overlay software representative in training. Plaintiff was placed under the supervision of marketing manage Hugh Jefferson Ray. The branch manager of the Renaissance branch was Eugene Kennedy. Plaintiff's new position was designed to greatly reduce the stress of a full sales quota position. Under her new position, plaintiff would receive credit for each sale made by the branch. In other words, plaintiff could achieve her quota, in part, by receiving credit for the quotas obtained by the entire branch. *Id.* at 311.

In April of 1986, plaintiff was given a performance plan which required five more months of training. She was required to learn more about IBM's products and marketing techniques. During this training period, she met with account marketing representatives from her branch and eventually escorted them on customer calls. In September of 1986, she assumed full duties as overlay software representative. She also received a written evaluation from Ray which gave her a low, but satisfactory rating.

The evaluation provided, in part:

> **OFFICE SKILLS DEVELOPMENT**
>
> While Roz attended classes that specialized in office systems, she recognizes a need to enhance her DISOSS and PC software skills. She has not demonstrated her understanding of connectivity to her manager. . . . Roz is aware that her technical credibility is key to her success and has an

> action plan in place to develop her proficiency immediately.
>
> * * *
>
> . . . While [Roz] was expected to prove herself through at least three formal demos and presentations, she only completed one formal presentation on AS and one informal presentation of AS in a call at AAA. Roz understands demos and presentations are an intrinsic part of the successful sell cycle. . . .

The evaluation listed three areas that needed improvement: (1) initiative in closing business; (2) enhancement of office technical skills; and (3) meeting commitments to management.

From September to December, 1986, plaintiff's performance was sub-par. Plaintiff's lack of product and marketing knowledge caused the account marketing representatives to avoid utilizing her assistance. Marketing Manager Steve Miltenberger documented some of the complaints received from account marketing representatives in a memo to plaintiff's supervisor, Ray, dated November 6, 1986. The memo stated that plaintiff's product knowledge was very weak and that plaintiff often requested meetings to cover material discussed in previous meetings. Miltenberger stated he was concerned about the credibility of the entire account team. In December, 1986, Ray informed plaintiff that if she did not improve her performance she would receive an unsatisfactory rating on her next formal evaluation.

On April 2, 1987, plaintiff received an unsatisfactory performance evaluation from Ray. The evaluation indicated plaintiff failed to meet job expectations in the areas of customer plans and programs, territory objectives and professional responsibilities. The evaluation was summarized as follows:

> Roz is a positive and eager member of the branch. Her efforts must, however, be weighed against her results and contribution. She has not met her marketing objectives. She has not been an active participant and contributor to a win and was not at all involved in a key loss. She does not understand the realistic opportunity in the office and is not conversant with current marketing situations. She has not maintained a working plan of her accounts. She has not developed an Executive Education Plan. Her peer credibility continues to suffer based on lack of product knowledge and effective use of their time. She must improve in her use of resources. Her leadership has not been demonstrated in a successful marketing effort. She is respected for her positive "Can Do" attitude and sincere desire for improvement, but is not meeting the requirements of the job. Roz's overall performance does not meet the requirements of the job.

After receiving her April, 1987, evaluation, plaintiff filed her second open door complaint. Again, she alleged unfair treatment. George DeCou was assigned to investigate the complaint and concluded that plaintiff was treated fairly.Thereafter, plaintiff was placed on a ninety-day improvement plan. *Id.* at 370.

The improvement period commenced on May 22, 1987. Plaintiff was provided a six-point marketing objective plan that required:

1. Identification of five marketing opportunities in the 90-day period;
2. Quality opportunities with input from branch reps and marketing management;
3. Develop effective marketing strategies with the objective of selling and/or installing prod-

uct identified in plaintiff's five marketing opportunities by August 31, 1987;

4. Identification of milestones for above mentioned strategies that allow for the closing of business by August 31, 1987;

5. Meet milestone dates; and

6. Make plan changes with management concurrence.

The plan outlined territory objectives and professional responsibilities. The plan also provided that:

> [f]ailure to satisfactorily complete any phase of the improvement plan or failure to demonstrate immediate marked and sustained improvement during the improvement period will result in your termination from IBM at any time during the improvement period.

During the improvement period, Ray stressed the importance of closing sales within the ninety-day period. *Id.* at 384. Ray also referred plaintiff to an IBM system engineer in order to improve her forecasting abilities. *Id.* at 378. Pursuant to the improvement plan, plaintiff identified five clients, but changed the prospective list several times during the improvement period. *Id.* at 415-420. Near the end of the ninety-day improvement period, plaintiff told Ray that she could find no sales opportunities in her territory.

In July of 1987, Ray met with plaintiff for an informal review of her performance. Ray told plaintiff she was not meeting the goals of the plan and discussed with her the steps that needed to be taken to improve her performance. Her performance did not improve and on September 4, 1987, plaintiff received a formal performance evaluation of unsatisfactory. As a result, plaintiff was terminated from her employment. *Id.* at 435.

LAW

Defendants claim that plaintiff fraudulently joined defendants Ray and Kennedy in order to defeat the diversity jurisdiction of this Court. When removal is based on diversity and the fraudulent joinder of non-diverse parties is alleged, the court is prohibited from remanding the case if the claims against the non-diverse parties are capable of summary judgment. *Spence v. Flynt*, 647 F.Supp. 1266, 1271 (D.Wyo. 1986). The party seeking removal and claiming fraudulent joinder has the burden of proving that the defendants are not liable under applicable law. *Id.*, *Monroe v. Consolidated Freightways, Inc.*, 654 F.Supp. 661, 662 (E.D. Mo. 1987). Therefore, the Court cannot remand this case to state court if plaintiff has failed to show that defendants Ray and Kennedy attempted to further their own personal interests by intentionally interferring into plaintiff's business or economic relationship with IBM.

Count I of the complaint alleges that defendant IBM wrongfully terminated the plaintiff without just cause. Because no claim or cause of action is asserted against defendants Ray or Kennedy, Count I need not be considered to decide this motion. *Id.* Count II alleges that defendants Ray and Kennedy, in pursuit of their own personal goals, deliberately and in bad faith, influenced plaintiff's economic relationship with IBM by making the duties of her job impossible to achieve.

To succeed on her Count II claim, plaintiff must establish that defendants Ray and Kennedy intentionally engaged in an illegal, unethical or fraudulent act in order to damage plaintiff's business relationship with IBM. *Formall v. Community National Bank*, 166 Mich. App. 772, 779 (1988). Plaintiff also must establish that Ray and Kennedy were acting to further their own personal interests instead of benefiting IBM. *Stack v. Marcum*, 147 Mich.App. 756, 760 (1985).

Plaintiff submits that defendants possessed an illegal, unethical or fradulent intention to damage her business relationship with IBM. According to the plaintiff, defendants Ray and Kennedy intended to discriminate against her on the basis of race. (Plaintiff's Brief in Support of Motion to Remand, pg. 5). Plaintiff has already admitted in her deposition that Ray and Kennedy did not discriminate against her because of her race.

> Q. Did Mr. Ray ever treat you differently because of your race?
>
> A. Did he ever treat me differently because of my race? What do you mean by that?
>
> Q. Did you ever feel he treated you differently because you were black?
>
> A. No.

Plaintiff also indicated that she had no evidence that Ray and Kennedy treated her any differently than they treated white marketing representatives. (Deposition of Rosalind Merriweather, pg. 99-100). In Merriweather I, this Court ruled that plaintiff had failed to prove the existence of discrimination based on race. (Memorandum Opinion and Order of May 10, 1989, pg. 14-15). Because no new evidence of discrimination has been presented, plaintiff's claim of discriminatory behavior by Ray and Kennedy is not substantiated.

Plaintiff also alleges that Ray and Kennedy intentionally set out to effectuate her discharge by actually programming her to fail. (Plaintiff's Brief in Support of Motion to Remand, pg. 2). According to plaintiff, defendants carried out this plan by placing plaintiff on a ninety day-improvement plan she did not need and which both Ray and Kennedy knew she could not successfully complete. *Id.*

Plaintiff has offered no evidentiary support for these allegations. In fact the record indicates that neither Ray

nor Kennedy behaved improperly toward the plaintiff. Ray regularly reviewed with plaintiff her progress and failings, and made suggestions as to how plaintiff could improve her performance. (Deposition of Ray, pg. 133, 137). In addition to suggestions, plaintiff received periodic evaluations, advise from a forecasting expert, eleven months of training and performance plans. This was not all done to program plaintiff's failure, but rather as a means to increase her knowledge of IBM's products and improve her sales skills. Despite these efforts, plaintiff's performance remained substandard. (*Id.* at 130). Defendants Ray and Kennedy were not the only two persons to notice plaintiff's poor performance at work. Other employees complained about her performance, including marketing manager, Steve Mittenberger, who informed Ray about some of plaintiff's weaknesses in writing on November 6, 1986.

The fact that plaintiff may have met her quota did not mean she was exempt from being required to complete an improvement plan. (Deposition of Ray, p. 143). Meeting one's quota is only one part of a marketing representative's job and therefore does not mean that plaintiff had successfully completed the requirements of her performance plan. *Id.* at pg. 45-46. Because plaintiff's evaluations indicated she was not meeting most of the goals of her performance plan, the decision to place her in an improvement plan was not unfair.

An examination of the record presents no genuine issue of material fact regarding the alleged actions of Ray and Kennedy to intentionally interfere with the business relationship between plaintiff and IBM. Plaintiff's own deposition testimony, as well as this Court's Memorandum Opinion and Order in Merriweather I, clearly established the absence of any intention to discriminate against plaintiff on the basis of her race. Plaintiff has not set forth any other evidence to prove that Ray and Kennedy either programmed her to fail, or intended to interfere with her business relationship with IBM. The record shows

months of training, frequent evaluations, suggestions as to how to improve, performance plans, and improvement plans. The record does not indicate the existence of any actions by defendants Ray or Kennedy to interfere with plaintiff's business relationship.

Likewise, no genuine issue of material fact exists as to whether or not Ray and Kennedy acted solely to further their own personal interests. Plaintiff was not treated arbitrarily by defendants Ray and Kennedy. Before Ray placed plaintiff on the ninety-day improvement plan, he received the approval of Kennedy and IBM's personnel management staff. (Deposition of Ray, pg. 143). The decision to terminate plaintiff's employment was also made by Ray and Kennedy only after receiving the concurrence of IBM's personnel management staff. (Deposition of Kennedy at pg. 56).

Under IBM's sales structure, Ray and Kennedy had nothing to personally gain by programming plaintiff to fail. As supervisor and branch manager, respectively, defendants were assigned an annual sales quota which was then ultimately distributed to the marketing representatives. Whether or not defendants reached their assigned quotas depended to a large extent on the success of all the sales representatives at the Branch. (Deposition of Ray at pg. 47). Performance plans and improvement plans designed to cause failure could have had detrimental impact on the individual evaluations and earnings of both Ray and Kennedy. These facts show that defendants did not act improperly or for their own personal motives. Instead, their attempt to improve plaintiff's performance and their decision to terminate her employment were decisions which were reviewed by IBM's personnel management staff and approved as actions taken in IBM's best interest.

CONCLUSION

Based on the foregoing, no genuine issues of material fact exists as to whether or not defendants Ray and Ken-

nedy intentionally interferred into plaintiff's business or economic relationship with IBM. No evidence of intentional interference or personal motive exists. As a result, plaintiff has no valid cause of action against defendants Ray or Kennedy. Joinder of a resident defendant against whom no cause of action exists will not defeat removal. *Lowell Staats Mining Co. v. Philadelphia Electric Co.*, 651 F.Supp. at 1364, 1366 (D.Colo. 1987). Therefore, this Court hereby DENIES plaintiff's motion to remand to the Wayne County Circuit Court.

IT IS SO ORDERED.

/s/ L. P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Pursuant to Rule 77(d), FRCivP
COPIES HAVE BEEN MAILED TO THE FOLLOWING:
Atty Joseph A. Ritok, Jr.
Atty Lionel J. Postic
on Sept. 22, 1989
/s/ Rosslie P. Nastwold
DEPUTY CLERK

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 89-2023/90-1308

ROSALIND MERRIWEATHER,
Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS MACHINES, ETC., *ET AL.*,
Defendants-Appellees

FILED

SEP 14 1990

LEONARD GREEN, Clerk

ORDER

BEFORE: MERRITT, Chief Judge; JONES, Circuit Judge; and PECK, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

(2)

No. 90-1096

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROSALIND MERRIWEATHER,
Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PETITIONER FAILS TO DEMONSTRATE "SPECIAL AND IMPORTANT REASONS" FOR WHICH THIS COURT SHOULD GRANT HER PETITION FOR WRIT OF CERTIORARI?

II. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S RACE DISCRIMINATION CLAIM?

III. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION TO AMEND HER COMPLAINT TO ADD A BREACH OF IMPLIED EMPLOYMENT AGREEMENT CLAIM IN *MERRIWEATHER I*?

IV. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S BREACH OF IMPLIED EMPLOYMENT AGREEMENT CLAIM IN *MERRIWEATHER II*?

V. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES?

TABLE OF CONTENTS

TABLE OF CONTENTS — (Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES — (Continued)

TABLE OF AUTHORITIES — (Continued)

TABLE OF AUTHORITIES — (Continued)

APPLICABLE STATUTORY PROVISION

At issue is Section 202 of the Michigan Elliott-Larsen Civil Rights Act, M.C.L.A. 37.2202, the text of which appears on page 18 of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This action arises from an employment dispute between Petitioner and her former employer, International Business Machines Corporation ("IBM"). Petitioner alleges that IBM discharged her from its employ on account of her race and in breach of an implied employment agreement to discharge only for just cause. The substantive issues involved in this action concern state law exclusively. There are no federal claims.

A. Petitioner's Employment History With IBM

Petitioner began her employment at IBM in November, 1976. She was trained in accordance with a structured program provided by IBM to all of its new marketing representatives, and thereafter, was assigned a quota and territory.

Petitioner was a satisfactory performer until 1981, when she experienced a number of personal problems that permanently affected her performance. Petitioner's only child died that year, and she and her husband were divorced. Petitioner admits that after the occurrence of these events, she simply could not perform for IBM as she had before.

From 1981 through 1984, Petitioner's performance declined. In her Petition, Petitioner blames her performance problems on "significant difficulties in her relationship with her superiors." However, there is no evidence in the record suggesting that Petitioner's relationships with her supervisors were at fault.

Petitioner went on fully paid sick leave because of emotional problems in October 1984. When she returned from sick leave in January 1985, IBM placed her into a retraining program. In June

1985, just before being placed back on sales quota, Petitioner again went on fully paid sick leave due to emotional difficulties.

Petitioner returned to work in April 1986. IBM placed her in its Detroit Renaissance Center branch office under the direction of Marketing Manager Jeff Ray. Petitioner was placed in the position of "overlay software marketing representative." In that position, she was expected to "sell" software to marketing representatives and directly to customers, to keep the representatives informed of new technologies, and to help them in the marketing effort by providing additional expertise. From April to September 1986, Petitioner attended training classes concerning IBM's software products and marketing techniques. Thereafter, Petitioner was given a performance plan which described her responsibilities and was placed on quota.

While Petitioner was assigned a sales quota, she did not bear the full pressure of a quota assignment. An overlay marketing representative achieves her quota in part by "riding" on the quota of the entire branch; that is, she receives credit for every piece of software sold by the other marketing representatives.

Although Petitioner performed satisfactorily in September, she did not meet the requirements of her plan from October to December 1986. She did not forecast business opportunities accurately, nor was she instrumental in selling software. Despite her extensive training period and her long years of selling experience, other branch employees complained that Petitioner had nothing to contribute.

In December 1986, Ray completed an informal appraisal of Petitioner's performance. He informed her that unless she quickly improved, he would have to rate her "unsatisfactory" on her next formal evaluation. If this occurred, Petitioner would be placed on a 90-day "improvement plan." Ray advised Petitioner as to how she could improve her performance.

Despite Ray's discussion with Petitioner, her performance did not improve. On April 2, 1987, she received a formal

performance evaluation from Ray rating her as "unsatisfactory." The review stated:

> Roz is a positive and eager member of the branch. Her efforts must, however, be weighed against her results and contribution. She has not met her marketing objectives. She has not been an active participant and contributor to a win and was not at all involved in a key loss. She does not understand the realistic opportunity in the office and is not conversant with current marketing situations. She has not maintained a working plan on her accounts. She has not developed an Executive Education Plan. Her peer credibility continues to suffer based on lack of product knowledge and effective use of their time. She must improve in her use of resources. Her leadership has not been demonstrated in a successful marketing effort. She is respected for her positive "Can do" attitude and sincere desire for improvement, but is not meeting the requirements of the job.

B. The Discharge

Petitioner was placed on an improvement plan on May 22, 1987. The plan required that Petitioner identify five top marketing opportunities, develop effective marketing strategies, and close business by August 31, 1987. The plan further required that she submit accurate monthly forecasts. Ray informed Petitioner that unless she succeeded, her employment would be terminated.

While Petitioner technically met her quota during the improvement plan period, she did so only through the sales efforts of the marketing representatives in the branch. She did not make or contribute to any of the sales made during the period, nor did she make *any* progress toward achieving her improvement plan goals. On September 4, 1988, as a result of her consistently unsatisfactory performance, Petitioner's employment was terminated. Upon her termination, IBM paid Petitioner twenty-two weeks salary as severance pay. Shortly after her discharge, Petitioner filed a workers' compensation claim, which IBM settled with payment to Petitioner of $80,000.

C. "Merriweather I"

Petitioner filed suit against IBM in state court on May 10, 1988, alleging, *inter alia*, that IBM had discharged her from its employ on the basis of race ("Merriweather I"). IBM removed the case to the United States District Court for the Eastern District of Michigan on the basis of diversity.

On July 26, 1988, the District Court conducted a scheduling conference, setting a discovery cut-off date of January 25, 1989 and a dispositive motion cut-off date of February 15, 1989. During the scheduling conference, the parties explicitly agreed that no additional claims would be added. Shortly thereafter, Petitioner served her Fourth Set of Interrogatories on IBM, seeking, *inter alia*, information relative to other IBM employees who had submitted race discrimination complaints to IBM. IBM objected to producing this information, and the District Court upheld the objection.

On February 15, 1989, IBM filed its Motion for Summary Judgment. On the same date, Petitioner filed a Motion for Leave to File her First Amended Complaint, seeking to add a claim alleging breach of an implied employment agreement. The District Court denied Petitioner's motion on the grounds of undue delay prejudicial to IBM and because Petitioner's motion was in explicit contradiction of her prior agreement *not* to amend her Complaint. On May 10, 1989, the District Court granted IBM's Motion for Summary Judgment.

D. "Merriweather II"

On April 20, 1989, Petitioner filed a second lawsuit in state court against IBM, joining Petitioner's former supervisors as individual defendants ("Merriweather II"). The lawsuit alleged, *inter alia*, that IBM had wrongfully discharged Petitioner in breach of an implied employment agreement.

The action was removed to the United States District Court for the Eastern District of Michigan on the basis of diversity. Petitioner filed a Motion to Remand, but the District Court

retained jurisdiction, holding that the individual defendants had been fraudulently joined for purposes of defeating diversity. On February 12, 1990, the District Court granted Respondents' Motion for Summary Judgment, holding that Petitioner's breach of contract claim was barred by the doctrine of collateral estoppel.

Petitioner appealed the district court's decisions in both *Merriweather I* and *Merriweather II* to the United States Court of Appeals for the Sixth Circuit, and the Sixth Circuit affirmed both decisions.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because Petitioner has failed to show, or even to assert, that there are "special and important" reasons justifying the attention of this Court. Sup. Ct. R. 10.1. Petitioner has failed to allege any conflict between the Sixth Circuit's decision and the decisions of other circuits, the Michigan Supreme Court, or this Court. Moreover, Petitioner has failed to assert a departure from the usual course of judicial proceedings or an improperly decided federal question. Instead, Petitioner presents a case involving purely state law concerns. This Court does not properly function as a second court of appeal, especially where only state law substantive issues are involved. Therefore, this Petition should not be granted.

Petitioner cannot establish that her claims have merit, in any case. With regard to her race discrimination claim, Petitioner cannot establish that she was treated differently than white IBM representatives, or even that she was treated unfairly. The Sixth Circuit properly affirmed the District Court's dismissal of this claim.

The Sixth Circuit also properly affirmed the District Court's denial of Petitioner's Motion to Amend her Complaint in *Merriweather I*. Petitioner failed to bring her Motion until after the close of discovery and until the day IBM filed its Motion for Summary Judgment. Moreover, Petitioner had agreed seven months earlier that she would not seek any amendments to the

pleadings. Clearly, the District Court did not abuse its discretion by denying Petitioner's Motion.

The Sixth Circuit properly affirmed the denial of Petitioner's breach of contract claim in *Merriweather II*, as well. The District Court correctly determined that this claim was barred by the doctrine of collateral estoppel, as the *Merriweather I* court had found that Petitioner had been discharged because of unsatisfactory work performance.

Even if the District Court erred in holding that collateral estoppel precluded Petitioner's breach of contract claim, the Sixth Circuit properly upheld the decision. Petitioner's breach of contract claim was also barred by the doctrine of *res judicata*, and was untenable in light of the undisputed fact that Petitioner could not satisfactorily perform her job duties.

Finally, the District Court properly upheld IBM's objections to producing information concerning other employees who filed discrimination complaints. The information was not relevant to Petitioner's claims, violated the privacy rights of individuals not party to the litigation and was unduly burdensome to produce. The District Court has broad discretion in such matters, and should not be reversed unless the Petitioner can show that the District Court abused its discretion and that she was prejudiced thereby. As Petitioner made no such showing, the Sixth Circuit properly upheld the District Court's decision.

ARGUMENT

I. PETITIONER HAS FAILED TO DEMONSTRATE SUFFICIENT REASON FOR THIS COURT TO GRANT HER PETITION

Rule 10.1 of the Supreme Court Rules states that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." The rule lists examples of reasons which will be considered, including:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with or of a United States court of appeals.
>
> (c) When . . . a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

This case does not involve important questions of federal law, nor has Petitioner established, or even asserted, that the rulings of the District Court, affirmed by the Sixth Circuit, conflict with the decisions of the Supreme Court or other circuit courts of appeal. Moreover, Petitioner has failed to show that the Sixth Circuit departed from the usual course of judicial proceedings, or sanctioned such a departure by the District Court. Petitioner merely asserts, based on the individual facts of this case, that the District Court should have ruled differently on purely state law and procedural issues. Such an assertion is not an adequate basis for

this Court to grant certiorari. As stated in *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 43 S. Ct. 422, 67 L. Ed. 712 (1923):

> . . . [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. at 393, 43 S. Ct. at 423.

The rules of the Supreme Court urge litigants filing petitions for certiorari to focus on the exceptional need for Supreme Court review, rather than on the merits of the underlying case. Petitioner does the exact opposite and focuses only upon the unique facts of this case. Petitioner seeks review by this Court merely as a second court of appeal, and review would be improper for such a purpose. As stated by Chief Justice Taft:

> No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal.

Jurisdiction of Circuit Courts of Appeals and United States Supreme Court Pay of Supreme Court Reporter, Hearings Before the House Committee on the Judiciary, 6th Cong., 2d Sess. 33 at 2 (1922) (Taft, C. J.).

Petitioner's underlying claims deal with substantive issues of an exclusively "state law" nature. She has asserted no federal claims. Moreover, the procedural issues raised by Petitioner

concern simple, straightforward matters of discovery, and the propriety of the District Court's refusal to permit an amendment to her Complaint. Such procedural issues are resolved by the lower courts on a daily basis, and do not merit the attention of this Court, especially where the Sixth Circuit found no basis for reversal.

As Petitioner has failed to establish, or even to assert, that this case involves such "special and important" issues as to justify review by this Court, the Court should deny Petitioner's Petition for Writ of Certiori.

II. THE SIXTH CIRCUIT PROPERLY AFFIRMED THE DISMISSAL OF PETITIONER'S RACE DISCRIMINATION CLAIM

Petitioner asserts that the District Court improperly granted summary judgment in IBM's favor with regard to her discrimination claim, as genuine issues of material fact exist. This Court should not be in the position of reviewing a trial court record to find disputes of fact. Petitioner is unable to establish the existence of such genuine issues here.

In order to establish a *prima facie* case of discrimination, Petitioner must prove that she was treated differently for the same or similar conduct than persons who were members of a different class. *Civil Rights Commission v. Chrysler*, 80 Mich. App. 368, 373 (1977). Petitioner cannot prove this, and said so during her deposition, stating that she does not know of other marketing representatives who were treated differently than she, nor does she have any knowledge of their performance plans or the goals which they were required to meet. Furthermore, Petitioner admitted that she *does not believe* she was treated differently because of her race within the statute of limitations period.

Petitioner argues on page 24 of her Petition that her undisputed lack of product knowledge was IBM's responsibility, in that IBM should have provided Petitioner with more or better training. There is no dispute that Petitioner received a *tremendous* amount

of training before being placed on quota in September 1986. Petitioner participated in IBM's formal training program for marketing representatives during the initial months of her employment with IBM and attended numerous education classes during the entire period of her employment. She was given six months of retraining in 1985, and an additional five months of training upon the commencement of her employment at the Detroit Renaissance Center branch office. Thereafter, she continued to take classes considered beneficial to her ability to perform her job duties. Clearly, the District Court, as affirmed by the Sixth Circuit, did not err in finding that IBM properly provided training to Petitioner.

Petitioner asserts on pages 24-25 of her Petition that Ray required her to make direct contact with customers, while the branch manager, John Kennedy, did not want her to have direct client contact. This assertion is untrue. The record establishes that Petitioner could fulfill her sales plan goals either by selling directly to customers *or* by providing assistance to marketing representatives in making sales. Moreover, Petitioner admitted during her deposition that she was *not* forbidden from contacting customers directly. Because her role as overlay representative required her to work closely with marketing representatives, Petitioner was expected to inform the appropriate marketing representative of her desire to contact his customer prior to contacting the customer.

Petitioner places much emphasis on the fact that she attained her quota in 1987 while certain other overlay software representatives did not. However, the mere fact that Petitioner met her quota in 1987 does *not* suggest that she should have been treated differently. Jeff Ray testified during his deposition that attainment of quota was only *one aspect* of Petitioner's performance plan, and that other aspects of her performance were considered in evaluating her.

On page 22 of her Petition, Petitioner lists three overlay software marketing representatives who failed to attain their quotas in 1987, yet remained employed with IBM. This evidence

fails to support Petitioner's claim, as she offers *no* evidence regarding the overall performance of the representatives she discusses. Moreover, Petitioner ignores the fact that she achieved only 46% of her quota in 1986, yet was not fired until September 1987, when she was discharged for overall unsatisfactory performance.

On page 23 of her Petition, Petitioner "ranks" overlay software marketing representatives in Michigan in terms of quota attainment, implying that, as Petitioner's attainment falls in the middle of the ranking, her performance cannot be deemed unsatisfactory. This argument does not support Petitioner's discrimination claim.

First, the argument ignores the fact that quota attainment is not the only aspect considered in evaluating a representative's performance. Petitioner has offered no evidence pertaining to these representatives' overall performance, and cannot dispute that her overall performance was unsatisfactory.

Second, Petitioner's numbers and rankings are meaningless, as they do not take into account the *quota assigned* to each representative. Quotas assigned to marketing representatives vary in accordance with the perceived potential in their sales territories. The mere fact that F. C. Tally attained more SRP points (i.e., sold more software) in 1987 than J. P. Mills does *not* mean that his performance in terms of quota was superior to that of Mills, as he may have been assigned a larger quota than Mills.

On pages 23 and 24 of her Petition, Petitioner compares her quota performance to that of software representatives in all of Area 4. Area 4 is a geographic unit consisting of Michigan, Ohio and Kentucky. All of the individuals listed by Petitioner were located in Ohio and Kentucky, except for Petitioner, Biarnes and Hoag. On May 8, 1989, the District Court denied Petitioner information concerning representatives located in Ohio and Kentucky, finding that these employees were not similarly situated to Petitioner. Petitioner did not appeal this ruling, but nevertheless

now presents evidence concerning such employees. Clearly, such evidence cannot be used in this manner.

Second, Petitioner fails to present any evidence concerning the overall job performance of the employees listed. Petitioner places *all* her emphasis on quota attainment, assuming that because she ranked in the middle of the employees listed, she was performing satisfactorily. This assumption is erroneous.

Finally, the representatives listed were placed on quota as overlay software marketing representatives at different times, and thus were at different stages in their marketing effort at the time Petitioner's listing was prepared. Moreover, Petitioner's list ranks *mid-year*, rather than year-end, quota attainment. As quotas are assigned annually, and often change during the course of the year to reflect unforeseen events, the only quota attainment figures of significance are those reflecting year-end attainment.

On page 25 of her Brief, Petitioner asserts that "[t]he sole distinguishing characteristic between Merriweather and the other overlay software representatives in Michigan in 1987 is her race." This assertion is completely unsupported by evidence, as the *only* factor which Petitioner has reviewed with regard to other overlay software representatives *except* race is quota attainment. She has not offered any evidence of the overall performances of the representatives she discusses, and so cannot show that they were similarly situated to her but treated differently. Absent proof that the other employees were similarly situated, it is not possible to raise an inference of discrimination by proof that the other employees were not similarly treated. *Shah v. General Electric Co.*, 816 F.2d 264 (6th Cir. 1987).

Petitioner asserts in her Brief that IBM's proferred reasons for discharging her were a pretext for discrimination. However, Petitioner is unable to show support for this in the record. Petitioner does not dispute that she could not forecast future sales accurately, that she was not involved in a single significant sale during her period of employment at the Renaissance Branch office, or that the marketing representatives complained about her

performance. Furthermore, Petitioner does not dispute that she could not successfully achieve the goals of her performance plans or the improvement plan.

Petitioner's claim of discrimination is specious by her own admission. During her deposition, Petitioner admitted that personal problems occurring in 1981 rendered her unable to perform her job functions as she had before. Evidence in the record establishes that those personal problems continued into 1986 and 1987. Furthermore, Petitioner testified that she *does not believe* that she has been treated differently because of her race since May 10, 1985.

The evidence is clear that Petitioner cannot establish discrimination based on race. The Sixth Circuit properly affirmed the District Court's granting of IBM's Motion for Summary Judgment and there is no reason for this Court to conduct a second review.

III. THE SIXTH CIRCUIT PROPERLY UPHELD THE DENIAL OF PETITIONER'S MOTION TO AMEND HER COMPLAINT IN *MERRIWEATHER I*

Rule 15(a) of the Federal Rules of Civil Procedure states that "leave [to amend] shall be freely given when justice so requires." It is within the discretion of the trial court to determine whether "justice so requires," and the mandate that leave to amend should be "freely given" does not mean that it should be granted automatically. *Deasy v. Hill*, 833 F.2d 38 (4th Cir. 1987), *cert. denied*, 485 U.S. 977, 99 L. Ed. 2d 483, 108 S. Ct. 1271, citing *Foman v. Davis*, 372 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962).

The denial of Petitioner's Motion to Amend her complaint may be reversed only if the denial was an "abuse of discretion." *Janikowski v. Bendix Corp.*, 823 F.2d 945 (6th Cir. 1987). An abuse of discretion exists:

> when judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused

where no reasonable man would take the view adopted by the trial court. *Delno v. Market Street Ry Co.*, 124 F 2d 965 (9th Cir. 1942).

The Sixth Circuit properly upheld the District Court's refusal to permit Petitioner to amend her Complaint. In *Foman v. Davis, supra*, this Court listed several reasons sufficient to support a denial of a motion to amend a complaint, including undue delay and undue prejudice to the opposing party. The District Court found these reasons to exist in this case.

For no discernible reason, Petitioner waited until after the completion of all discovery and until the day IBM filed its Motion for Summary Judgment to file her Motion to Amend. Her proposed amendment was based on an alleged "policy and practice" of IBM that was communicated to her *prior to* her termination from IBM's employ. Thus, Petitioner *admitted* that she knew the alleged facts upon which she based her claim *prior to* the filing of her initial complaint, yet failed to bring the claim until after discovery was completed and IBM's summary judgment motion was pending. IBM would have been severely prejudiced if Petitioner's motion had been granted, as it would have had to sustain the expense and related inconvenience of a repeat round of responsive pleading, discovery and motion practice, all of which could have been undertaken as an aspect of the pretrial activities.

Motions to amend pleadings have been almost uniformly denied in circumstances such as these. See *Kennedy v. Josephthal & Co., Inc.*, 814 F.2d 798 (1st Cir. 1987); *Ansam Associates, Inc. v. Cola Petroleum, Ltd.*, 760 F.2d 442 (2nd Cir. 1985); *Bilmar Drilling, Inc. v. IFG Leasing Co.*, 795 F.2d 1194 (5th Cir. 1986); *Kleinhaus v. Lisle Savings Profit Sharing Trust*, 810 F.2d 618 (7th Cir. 1987); *Robertson v. Arizona Board of Regents*, 661 F.2d 796 (9th Cir. 1981); *Anderson v. USAir*, 818 F.2d 49 (D.C. Cir. 1987); *Minor v. Northville Public Schools*, 605 F. Supp. 1185 (E.D. Mich. 1985).

Petitioner places great emphasis on *Janikowski v. Bendix Corp.*, 823 F.2d 945 (6th Cir. 1987), but her reliance is mis-

placed. In *Janikowski*, the plaintiff filed his motion to amend his complaint after the court-scheduled discovery cutoff date and after the defendant had filed a motion for summary judgment. However, the plaintiff's motion was not filed before the *actual* close of discovery, as the discovery period had been extended beyond the court-scheduled cutoff date until after the court had decided the defendant's summary judgment motion. Thus, the discovery period had *not* ended at the time the plaintiff in *Janikowski* filed his motion to amend.

Precisely on point is *Holland v. Metropolitan Life Insurance Co.*, 869 F.2d 1490 (6th Cir. 1989) (unpublished opinion, attached as Appendix A), where leave to amend was denied. The plaintiff had filed an age discrimination claim against her former employer. Discovery ended on November 23, and the District Court set December 21 as the last day for filing motions. On December 21, the defendant filed a motion for summary judgment. On the same day, the plaintiff filed a motion to add a breach of implied employment agreement claim. The court denied plaintiff's motion, finding that her delay in filing it was undue and that granting the motion so late into the litigation would unduly prejudice the defendant. The plaintiff appealed to the Sixth Circuit, which affirmed, stating:

> . . . In *Janikowski* . . . the timing of the motion to amend differed significantly from the present case. There the parties had agreed to hold discovery in abeyance until the court disposed of the defendant's motion for summary judgment. Discovery had not been completed. The Janikowski court expressly distinguished cases in which discovery was closed prior to the motion to amend . . . Where discovery is completed, the burden imposed on the defendant by allowing an amendment is greater, since the defendant likely will have begun trial preparation based on the issues aired in the discovery process.

The facts of the instant case are virtually identical to those of *Holland*, and therefore, Petitioner's motion to amend her complaint was properly denied.

Petitioner argues that the District Court abused its discretion by basing its decision in part upon "a scheduling order that fail[ed] to provide for a motion cutoff date for nondispositive motions . . ." Petitioner mischaracterizes the District Court's decision. The District Court did not rely only on the scheduling order, but upon Petitioner's counsels' representation during the scheduling conference that no motion to amend pleadings would be brought. This representation, together with the undue delay and resulting prejudice to IBM, justified the District Court's decision. The Sixth Circuit properly found that there was no abuse of discretion and there is absolutely no reason for this Court to review that decision.

IV. THE SIXTH CIRCUIT PROPERLY AFFIRMED THE DISMISSAL OF PETITIONER'S BREACH OF CONTRACT CLAIM IN *MERRIWEATHER II*

A. The District Court Properly Held That Petitioner's Claim Was Barred By Collateral Estoppel

The doctrine of collateral estoppel provides that "when an issue of fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Local 98 v. Flamegos Detroit Corp.*, 52. Mich App. 297, 302 (1974), quoting *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 1194, 25 L.Ed 2d 469, 475 (1970). The doctrine applies to findings of fact that were essential to the prior judgment. *Rinaldi v. Rinaldi*, 122 Mich. App. 391 (1983).

In *Merriweather I*, Petitioner alleged that she was discharged as a result of race discrimination. The District Court held that Petitioner's race discrimination claim had no merit, as Petitioner was in fact discharged for unsatisfactory work performance. In *Merriweather II*, the District Court held that the prior court's finding that Petitioner was discharged for unsatisfactory work performance was binding on her, and thus, Petitioner was collaterally estopped from asserting that she was discharged without just cause.

Petitioner argues that collateral estoppel is inapplicable, as the *Merriweather I* court's finding of unsatisfactory work performance was not necessary to the court's disposition of her claims. This argument is unpersuasive.

In her Response to IBM's Motion for Summary Judgment in *Merriweather I*, Petitioner sought to establish a *prima facie* case of discrimination by proving the elements set forth in *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) — that Petitioner was a member of a protected class, *that she was qualified for the job from which she was discharged*, and that she was discharged while other employees not in the protected class were retained. Petitioner then reviewed elements of Petitioner's job performance in an effort to prove that Petitioner was in fact qualified for her job.

In order to determine whether Petitioner had established a *prima facie* case of race discrimination under the *McDonnell-Douglas* standard, the District Court had *no choice* but to assess her job performance. Such an assessment was necessary to the Court's finding that Petitioner had failed to establish a *prima facie* case of discrimination, as it established that she had failed to prove an essential element of her case — that she was qualified for her job.

As the *Merriweather I* court's finding of unsatisfactory work performance was essential to its determination to dismiss the case, the *Merriweather II* Court properly held that Petitioner was collaterally estopped from asserting discharge without just cause, and the Sixth Circuit properly affirmed this decision.

B. Petitioner's Claim Is Barred By The Doctrine Of *Res Judicata*

Assuming *arguendo* that the District Court erred in determining that Petitioner's breach of contract claim was barred by

the collateral estoppel doctrine, her claim still cannot be maintained, as it is barred by the doctrine of res judicata.[1]

Res judicata constitutes a bar to a subsequent action where (1) the two actions are between the same parties or their privies; (2) the former action was decided on the merits; and (3) the same matter contested in the second action was decided in the first. *Ward v. DAIIE*, 115 Mich. App. 30 (1982).

Michigan adheres to the broad rule of *res judicata*, which states that claims that were actually litigated in a prior action are barred from the second action, *as well as* those claims arising out of the same transaction which Petitioner could have brought, but did not. *Carter v. SEMTA*, 135 Mich. App. 261 (1984); *Gose v. Monroe Auto Equipment Co.*, 409 Mich. 147 (1980).

The circumstances surrounding Petitioner's filing of her breach of contract claim in *Merriweather II* satisfy the elements required for preclusion under the *res judicata* doctrine. First, the same parties were involved in both cases — Petitioner and IBM. While Ray and Kennedy were added as individual defendants in *Merriweather II*, their inclusion does not defeat application of *res judicata*, as Petitioner made no allegations against them with respect to her breach of contract claim.

Even if she had, Michigan courts have held that "it is no objection that the former action included parties not joined in the present action, or vice versa, so long as the judgment was rendered on the merits. . . ." *Local 98 v. Flamegos Detroit Corp.*, 52 Mich. App. 297, 303 (1974), quoting *Dreſus v. First National Bank of Chicago*, 424 F.2d 1171, 1175 (7th Cir. 1970). Finally, Ray and Kennedy are "privies" of IBM, and thus cannot defeat application of the doctrine of *res judicata. Lowell Staats Mining*

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[1]While the Sixth Circuit and the District Court failed to rule on the *res judicata* issue, that does not prevent this Court from refusing to grant certiorari on this ground. *Washington v. Confederated Bands & Tribes of the Yakima Indian Notion*, 99 S. Ct. 740, 439 U.S. 463, 58 L. Ed. 2d 740, *rehearing denied*, 99 S. Ct. 1290, 440 U.S. 940, 59 L. Ed. 2d 500; *Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491, *reh denied*, 398 U.S. 914, 90 S. Ct. 1684, 26 L. Ed. 2d 80 (1970).

Co. v. Philadelphia Electric Co., 651 F. Supp. 1364 (D. Colo. 1987).

The federal court's dismissal of Petitioner's first action was an adjudication on the merits, as it was predicated upon Respondent's Motion for Summary Judgment. *See Kellepourey v. Burkhart*, 163 Mich. App. 251, 260 (1987), *vacated on other grounds*, 430 Mich. 888 (1988); *Adkins v. Allstate Insurance Co.*, 729 F.2d 974, 976 (4th Cir. 1984).

Finally, the instant action involves the same matter at issue as in Petitioner's first action: Petitioner's termination from IBM's employment. That Petitioner alleged race discrimination in her first action and alleges breach of contract here does not alter the fact that the same matter is in issue, as both claims arose out of the same discharge from employment, and thus, arose from the same "transaction." *See Carter v. SEMTA*, 135 Mich. App. 261 (1984); *Brownridge v. Michigan Mutual Insurance Co.*, 115 Mich. App. 745 (1982); *Vutci v. Indianapolis Life Insurance Co.*, 157 Mich. App. 429, 439 (fn. 3) (1987); *see also, Cemer v. Marathon Oil Co.*, 583 F.2d 830 (6th Cir. 1978).

As the prerequisites necessary for application of *res judicata* exist in this case, Petitioner is precluded from asserting her breach of contract claim against IBM. This analysis of state law should not be the basis for review by this Court.

C. IBM Had Just Cause To Terminate Petitioner's Employment

Even if Petitioner's breach of contract claim was not barred by the doctrines of *res judicata* and collateral estoppel, the District Court's judgment was properly affirmed, as Petitioner cannot establish her claim.

Petitioner alleges that she had an implied employment agreement with IBM that she would not be discharged except for good cause. Petitioner further alleges that she was discharged in violation of this agreement. Yet, the undisputed facts fail to establish a violation of the alleged just-cause contract, as

Petitioner was discharged due to her inability to perform her job functions.

The District Court in *Merriweather II* found it unnecessary to rule on the issue of whether Petitioner was discharged from IBM in breach of an implied employment agreement. However, it is clear from the Court's discussion of the collateral estoppel issue that the Court believed Petitioner was discharged for just cause. The District Court stated:

> Despite plaintiff's assertion that she was qualified, the [*Merriweather I*] Court concluded that plaintiff was terminated as the result of her poor performance evaluations and her inability to perform her job. This Court found the undisputed facts indicate plaintiff was not qualified. While plaintiff completed her training program she simply was unable to apply the knowledge she received. Plaintiff does not dispute her inability to forecast potential sales, nor that she was not involved in a significant sale during her employment at the Renaissance Branch Office. Likewise, plaintiff cannot rebut the fact that other employees complained about her performance and that her performance evaluations were below par. Plaintiff reached her quota due to overall branch sales. There is no question that plaintiff was unable to contribute to the branch sales effort.

Petitioner does not dispute that she was unable to forecast sales opportunities with any degree of accuracy, that her performance evaluations were below par, and that she was unable to contribute to the branch sales effort. In fact, Petitioner acknowledged her inability to successfully perform as a marketing representative for IBM, as she testified that her personal problems in 1981 rendered her unable to perform her job functions as she had before. Petitioner's filing of her Workers' Disability Compensation claim upon her termination further demonstrates her awareness of her inability to perform her job.

Petitioner argues that the issue of whether an employee was discharged for just cause is not capable of summary judgment.

Rather, Petitioner claims that such a question can only be resolved by a jury. Yet courts have routinely held that, where there is no genuine issue of material fact, just cause is a matter of law to be determined by the court. *See Stoken v. JET Electronics & Technology, Inc.*, 174 Mich. App. 457 (1988), *app. denied*, 432 Mich. 930 (1989); *Pachla v. Saunders System, Inc.*, 899 F.2d 496 (6th Cir. 1990); *McDonald v. Union Camp Corp.*, __ F.2d __, 52 FEP Cases 317 (6th Cir. 1990) (copy attached as Appendix B).

As Petitioner was admittedly unable to perform the requirements of her job, IBM was justified in terminating her employment. Just cause for the discharge existed as a matter of state law.

V. THE SIXTH CIRCUIT PROPERLY UPHELD THE DENIAL OF PETITIONER'S MOTION TO COMPEL

During the litigation of *Merriweather I*, Petitioner served her Fourth Set of Interrogatories on IBM, seeking, *inter alia*, information regarding race discrimination complaints filed by other IBM employees at the Renaissance Center branch office. IBM objected to providing such information, and the District Court properly refused to compel IBM to do so.

A trial court is vested with broad discretion in discovery matters, and it is unusual for an appellate court to find that a trial court has abused its discretion. *Swanner v. United States*, 406 F.2d 716, 719 (5th Cir. 1969). Even if a trial court's decision regarding discovery matters is erroneous, it will not be reversed absent the clearest showing that denial of the discovery results in actual and substantial prejudice to the complaining litigant. *Data Disc, Inc., v. Systems Technology Associates, Inc.*, 557 F.2d 1280 (9th Cir. 1977).

Petitioner seeks complaints filed pursuant to IBM's "Open Door" policy. The Open Door policy provides an avenue whereby IBM employees may take any and all concerns they may have regarding their employment to any manager senior to their direct manager or to any executive at IBM. The complaint may be resolved immediately or additional investigation may be under-

taken until the employee's concern has been appropriately addressed.

The Open Door complaints of other employees are completely irrelevant to Petitioner's claims. In order to prove a claim of discrimination, a plaintiff must prove that she was treated differently than other *similarly situated* employees. *Texas Department of Community Affairs v. Burdine*, 101 S. Ct. 1089, 450 U.S. 248, 67 L. Ed. 2d 207 (1981); *Shah v. General Electric Co.*, 816 F.2d 264 (6th Cir. 1987). Petitioner was the only overlay software representative at the Renaissance Center Branch Office during 1986 and 1987. Furthermore, there was no overlay software representative employed at the Renaissance Center Branch Office in 1984 and 1985. Therefore, no employee at that Branch was similarly situated to Petitioner.

Petitioner sought information concerning *all* employees at the Renaissance Branch, including clerical, managerial, sales, marketing and technical employees. These employees performed different functions, had different goals, and required different types of supervision than Petitioner. Thus, they were not similarly situated to her. The allegations of these employees and the investigations of their *individual* circumstances have no bearing on Petitioner's claim. *See Huff v. N.D. Cass Company of Alabama*, 468 F.2d 172 (5th Cir. 1972); *Goff v. Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982); *Weir v. Litton Bionetics*, 43 FEP Cases 663 (D. Md. 1987).

In addition to its irrelevant nature, disclosure of the information Petitioner requested would violate the privacy rights of persons not parties to this litigation. Non-party witnesses have privacy rights under the First and Fourth Amendments and under the Federal Rules of Civil Procedure upon which the courts should not readily intrude. *Clyburn v. News World Communications, Inc.*, 117 FRD 1 (D. DC. 1987). "Discovery should be limited to the core issues in a case essential to its resolution . . . and this factor weighs even more heavily where privacy interests are implicated." *Id.* at 2. *See also Farnesworth v. Proctor & Gamble Co.*, 758 F.2d 1545 (11th Cir. 1985).

The effectiveness of the Open door procedure depends on the strict confidentiality and privacy that Open Door complaints and investigations are accorded. Employees are assured that their concerns will be heard and investigated in the strictest confidence and that their privacy will be respected. Employees who are interviewed during the investigation of another employee's concern speak candidly in reliance upon the same assurance of confidentiality.

There are four criteria for identifying confidential communications which will not be subject to discovery:

1. The communication must originate in confidence;
2. The element of confidentiality must be elementary to the maintenance of the relationship;
3. The communication must be one which ought to be encouraged;
4. The injury caused by disclosure of the communication would be greater than the benefit gained.

8 Wigmore on Evidence § 2285 at 527 (McNaughton rev. 1961).

IBM's Open Door process clearly meets the requirements delineated above. First, Open Doors are submitted by employees in reliance upon assurances of complete confidentiality and privacy. Second, confidentiality is a necessary element to the effectiveness of the objective review. If employees were not assured of confidentiality they would not be candid or would not avail themselves of the process. Similarly, employees with information relevant to another employee's concerns would be resistant to speak candidly.

Third, IBM's Open Door policy should be encouraged because it helps the important process of internally airing and addressing employee concerns. Finally, the potential injury to the system from the disclosure of the confidential and private information far outweighs any benefit which could be gained. Subjecting Open Door complaints and investigations to disclosure

would cast a chilling effect over the entire process. Employees would hesitate to make submissions, and the company might not be as vigorous and candid in answering submissions.

In addition to their irrelevant and intrusive nature, Petitioner's interrogatories were objectionable because they were unduly burdensome and oppressive. Under the Open Door procedure, IBM employees can submit complaints regarding their employment to virtually any manager at IBM senior to their own direct supervisors. These complaints can concern any aspect of an employee's conditions of employment, such as appropriate pay, territory reassignments or quota adjustments. Open Door complaints can be resolved in an informal manner or a formal manner. Investigations of varying levels of complexity may be undertaken. Thus, IBM cannot keep formal records of all Open Door complaints "filed" by its employees. Furthermore, any formal records that may exist are maintained by the manager to whom the Open Doors were addressed, and not in some central depository. Therefore, providing the information Petitioner requested would require an analysis of numerous files, housed at geographically dispersed locations. Given the lack of relevance of the request, the District Court properly found that such a burden was not warranted. *See In Re U. S. Financial Securities Litigation*, 74 FRD 497 (D.C. Cal. 1975).

In light of the irrelevant, confidential and burdensome nature of the information sought by Petitioner, the Sixth Circuit properly upheld the District Court's refusal to compel production of the requested information. The trial court's discovery ruling is not sufficient to invoke a review by this Court.

CONCLUSION

Given the facts and authority cited above, Respondent respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,

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DATED: February 6, 1991

APPENDIX A

Holland v. Metropolitan Life Insurance Company

APPENDIX A

(To be reported at: 869 F.2d 1490 (Table))
Unpublished Disposition. Text in Westlaw.

NOTICE: The Sixth Circuit provides by rule criteria for designating decisions of publication, and states that citation of unpublished decisions is "disfavored" though under prescribed conditions such decisions may be cited if counsel serves a copy on all parties and the court. Sixth Circuit Rules, Rule 24, 28 U.S.C.A.

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DECISION WILL APPEAR IN TABLES PUBLISHED PERIODICALLY.

Jennieve HOLLAND, Plaintiff-Appellant,
v.
METROPOLITAN LIFE INSURANCE COMPANY,
Defendant-Appellee.
No. 88-1347.
United States Court of Appeals, Sixth Circuit.
Feb. 3, 1989.

E.D.Mich.
AFFIRMED.

On Appeal from the United States District Court for the Eastern District of Michigan.

Before KENNEDY and DAVID A. NELSON, Circuit Judges, and JOHN W. PECK, Senior Circuit Judge.

PER CURIAM.

Plaintiff Jennieve Holland appeals from the District Court's denial of her motion to amend her complaint under Fed.R.Civ.P. 15(a). We conclude the District Court did not abuse its discretion and accordingly affirm.

Holland v. Metropolitan Life Insurance Company

Holland was an employee of defendant Metropolitan Life Insurance Company ("Metropolitan") for over nineteen years. She was terminated on May 2, 1986. The company explained that her dismissal was part of a necessary reduction in work force; plaintiff contended that it was motivated by unlawful age discrimination. On January 5, 1987, Holland brought an action against Metropolitan in state court under the Elliott-Larsen Civil Rights Act, Mich.Comp.Laws Ann. § 37.2101, et seq. Defendant removed to the United States District Court on January 26, 1987.

Discovery originally was scheduled to end on September 30, 1987. After the parties stipulated to two extensions, November 23, 1987 was agreed to as the final discovery cutoff date. By consent of the parties, two additional depositions were taken after the discovery cutoff date on December 14, 1987. The District Court set December 21, 1987, as the last date for filing motions.

On December 21, 1987, Metropolitan moved for summary judgment on plaintiff's age discrimination claim. The District Court granted the summary judgment motion; plaintiff does not appeal this ruling. On the same day, plaintiff moved to amend her complaint to include a contract claim based on Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980). The contract claim was founded on Metropolitan's alleged violation of its "Guideline" for work force reductions. Plaintiff conceded that she had been aware of the Guideline since July 1987, but she argued that the viability of her Toussaint claim had been uncertain until she obtained the depositions of company officials during discovery in the age discrimination matter. In a ruling from the bench, the District Court denied plaintiff's motion to amend. Noting that discovery had been closed since November, the court concluded that "defendant would not be afforded an opportunity to fully defend on these charges without substantial discovery. . . ." Further, the court was unpersuaded by plaintiff's explanation for her delay in asserting the contract claim. Plaintiff, the court observed, "had a year of discovery" and should have

been able to determine the viability of the contract claim prior to the last day for motions.

A district court's decision to deny amendment under Rule 15(a) may be reversed only if it constitutes an abuse of discretion. Estes v. Kentucky Utilities Co., 636 F.2d 1131, 1133 (6th Cir.1980). In tension with this broad grant of discretion is Rule 15's provision that amendments should be "freely given" when justice so requires. The Rule was intended to "reinforce the principle that cases should be tried on their merits rather than the technicalities of pleadings." Tefft v. Seward, 689 F.2d 637, 639 (6th Cir.1982). To deny the motion to amend, the district court must find "at least some significant showing of prejudice to the opponent." Moore v. City of Paducah, 790 F.2d 557, 562 (6th Cir.1986). In light of plaintiff's lengthy delay in asserting her contract claim, we conclude the District Court did not abuse its discretion in denying the motion to amend.

Plaintiff relies heavily on Janikowski v. Bendix Corporation, 823 F.2d 945 (6th Cir.1987), which held that the district court had abused its discretion in refusing to allow Janikowski to amend his age discrimination complaint to include a contract claim. The court found the burden of additional discovery placed on Bendix was not sufficient prejudice to preclude plaintiff's contract action. Id. at 951. Instead, "[t]he proper remedy for subjecting [an opponent] to duplicative discovery would be to require the amending party to bear a portion of the additional expense." Id. at 952 (citations omitted). Plaintiff argues that she is in an identical position: she seeks to amend an age discrimination complaint to include a contract count, and the only prejudice to Metropolitan would be the burden of additional discovery. In Janikowski, however, the timing of the motion to amend differed significantly from the present case. There the parties had agreed to hold discovery in abeyance until the court disposed of the defendant's motion for summary judgment. Discovery had not been completed. The Janikowski court expressly distinguished cases in which discovery was closed prior to the motion to amend:

> Although prejudice has been found in cases where the motion for leave to amend was filed after completion of discovery, [citations omitted] no such fact pattern is present here.

823 F.2d at 952.

In the present case, by contrast, the motion to amend was filed weeks after the November 23 discovery cutoff date, and months after plaintiff concedes she became aware of defendant's Guideline. Plaintiff has offered no convincing reason for her delay until December 21. Where discovery is completed, the burden imposed on the defendant by allowing an amendment is greater, since the defendant likely will have begun trial preparation based on the issues aired in the discovery process.

Plaintiff observes that this Court permitted eleventh hour amendments in Moore and Tefft. In both of those cases, however, the plaintiff sought to amend the complaint to include a cause of action which clearly would have been supported by the facts alleged in the original pleadings. See Moore, 790 F.2d at 562 ("[R]ejection of the amendment would preclude plaintiff's opportunity to be heard on the merits on facts ... which were pleaded at the outset. ..."); Tefft, 689 F.2d at 639 ("It is obvious that the facts as set forth in Tefft's original complaint would support a cause of action for a constitutional tort, ..."). In the present case, plaintiff's complaint set forth facts sufficient to support an age discrimination claim, but not a contract claim. Plaintiff admits that her "original Complaint does not include an allegation about [Metropolitan's] lay-off policy." Reply Brief at 19. Since plaintiff's complaint did not allege sufficient facts to support the cause of action asserted in the amendment, the rationale of Moore and Tefft does not apply.

The judgment of the District Court is AFFIRMED.

C.A.6 (Mich.),1989.

APPENDIX B

APPENDIX B

McDONALD v. UNION CAMP CORP.

U.S. Court of Appeals,
Sixth Circuit (Cincinnati)
52 FEP Cases 817

McDONALD v. UNION CAMP CORPORATION, No. 89-1253, March 22, 1990

STATE FEP ACTS

1. Discharge •106.134001 •106.13273

Fifty-three-year-old manufacturing manager who was discharged after refusing demotion cannot prove that he was qualified for his position, where he acknowledges that supervisors were dissatisfied with his job performance, and while he argues that employer made too big a deal out of his alleged "people problems," he simply was not performing to employer's satisfaction.

2. Discharge •106.1325 •106.13273 •106.134001 •106.4306

Fifty-three-year-old manufacturing manager who was discharged after refusing demotion cannot make out prima facie case under Michigan courts' interpretation of Michigan Elliott-Larsen Civil Rights Act, where he is required to show that person responsible for discharge was predisposed to discriminate against persons in affected class, but while he argues that certain remarks make by his direct supervisor indicate clear case of age bias, he was discharged by that supervisor's superior, supervisor's remarks are not attributable to superior, and there is no evidence that superior was predisposed to age discrimination.

3. Discharge •106.1325 •106.13273 •106.13275 •106.13278 •106.134001 •108.7209

Summary judgment appropriately was granted to employer that discharged 53-year-old manufacturing manager after he

refused demotion, even though he made out prima facie case by alleging that general manager commented about length of his time with employer, stated that his supervisory techniques were outdated, and indicated that plant's most senior salesman at age 55 should be replaced with younger one who would be cheaper to employ, where employer explained that his alleged "people problems" were well documented, that he was unwilling to change his methods, and that he refused to accept different position, and while he argues that employer made too big a deal out of those alleged problems and that its explanation was merely a cover-up for discrimination, mere conclusory allegations are insufficient to withstand motion for summary judgment, fact that he disagrees with employer's assessment of his performance does not render its reasons pretextual, and allegedly discriminatory remarks made by general manager are not attributable to ultimate decision maker.

Appeal from the U.S. District Court for the Western District of Michigan. Affirmed.

Martin R. Strum, Kalamazoo, Mich., and Angela J. Nicita, Detroit, Mich., for appellant.

Jeffrey K. Ross and John T. Murray, Chicago, Ill., and Barry R. Smith (Miller, Johnson, Snell & Cummiskey), Kalamazoo, Mich., for appellee.

Before JONES and RYAN, Circuit Judges, and CELEBREZZE, Senior Circuit Judge.

Full Text of Opinion

ANTHONY J. CELEBREZZE, Senior Circuit Judge: — The plaintiff-appellant Robert McDonald brought this action against his former employer, the defendant-appellee Union Camp Corporation (hereinafter Union Camp) alleging in Count I, that his termination from Union Camp's employ was a breach of employment contract, and in Count II, that he was discriminato-

rily discharged because of his age in violation of the Elliott-Larsen Civil Rights Act, Mich. Comp. Laws Ann. §37.2101 *et seq.* (1985 & Supp. 1988). The complaint was originally filed in the Circuit Court for the County of Kalamazoo. However, on February 24, 1987, the defendant removed the case to the United States District Court for the Western District of Michigan on the basis of diversity jurisdiction. Title 29 U.S.C. §1441. McDonald now appeals the judgment of the district court which directed a verdict for Union Camp on the breach of contract claim, and the order which granted summary judgment in favor of Union Camp on the age discrimination claim. We affirm.

I.

Union Camp's Container Division manufactures corrugated containers, commonly known as cardboard boxes, at various plants located across the United States. Union Camp hired McDonald on January 25, 1960 at the Chicago box plant as a line supervisor. Thereafter, McDonald held various staff and supervisory positions with Union Camp, and in 1969, became the manufacturing manager for the Lapeer, Michigan box plant. In 1977, McDonald became the manufacturing manager for the Kalamazoo, Michigan plant as well as the Lapeer plant. He performed in this dual capacity until December 1980, when the Lapeer plant closed. McDonald remained as the manufacturing manager of the Kalamazoo plant until his employment was terminated in June 1986. As the plant manufacturing manager, McDonald had overall responsibility for the plant's actual manufacturing operations. The manufacturing supervisors reported to him, and he reported to the plant general manager, who had responsibility for the entire plant operation.

Union Camp reviewed the performance of its employees on an annual basis. The review was performed by the employee's immediate supervisor (in McDonald's case, the general manager). The evaluation was never shown to the employee, but was

discussed with the employee to the extent the reviewer chose to do so. In addition, raises were based upon job performance; the better an employee's evaluation, the higher the raise would be. There was also a bonus system in effect for supervisory personnel called the Management Incentive System Bonus Plan. The employee was given bonus points at the end of the year based upon the extent to which he achieved the goals set; the more points received, the higher the bonus.

It is undisputed that throughout many years at Union Camp, McDonald received excellent performance assessments and received various raises and bonuses recognizing his performance. However, personnel records show that McDonald had been critized over the years for his inability to communicate and get along with his superiors and subordinates. In fact, on several occasions, intermediate management officials recommended to the regional manager that McDonald be transferred or terminated. However, despite these recommendations, McDonald remained at the Kalamazoo plant since production and performance figures were good.

In 1985, Chris Bakaitis took over the position of General Manager of the Kalamazoo plant. At that time, personnel records showed that production was declining and that McDonald continued to have communication difficulties. In August 1985, Regional Manager Sutlive and General Manager Bakaitis placed McDonald on a sixty-day probation which called for "immediate and sustained improvement." McDonald objected to these evaluations and claimed that he was being subjected to age discrimination by his plant manager, Bakaitis.

Later, in March 1986, the new Regional Manager, Carl Raglin, General Manager Bakaitis, and another executive met with McDonald to again discuss his performance. During this meeting, McDonald refused to acknowledge any unsatisfactory conduct on his part and claim that his alleged communication difficulties were immaterial since his plant's production perform-

ance was excellent, and that any recent decline in production should not be held against him since production was down in all plants. Thereafter, McDonald was removed from the manufacturing manager's position and offered two other positions within the company, one as a Superintendent of Maintenance and Engineering, and one as a Second Shift Finishing Supervisor. Although Union Camp offered to continue McDonald at his former salary, both positions were considered demotions. McDonald refused both offers, and his termination became effective on July 11, 1986.[1]

As a result, McDonald filed his complaint bringing claims of age discrimination and breach of employment contract. On January 4, 1989, the district court granted Union Camp's Motion for Summary Judgment with respect to McDonald's age discrimination claim. The court held that there was no material factual dispute with respect to McDonald's prima facie case of unlawful age discrimination since McDonald admitted that his superiors were dissatisfied with his job performance. The court further opined that even if McDonald had established a prima facie case of age discrimination, Union Camp had articulated legitimate business reasons for its decision, and McDonald had failed to present evidence raising a genuine issue of material fact as to whether Union Camp's reasons were pretextual.

At trial on the breach of employment contract claim, the district court utilized the provisions of Michigan implied contract law and found that based on representations made to McDonald, a reasonable juror could find that Union Camp had made a contract with McDonald under which McDonald could be discharged from Union Camp only for just cause. The court further

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[1] McDonald's former position remained vacant until January 1988 when Union Camp hired John Pokerino, age 53, to fill that position. During the interim, McDonald's duties were split among Bakaitis, age 36; Knapp, age 33; and Corbin, age 53. It is also significant to note that Pokerino, at age 53, was hired well after the commencement of this age discrimination suit.

found, however, that there was no evidence from which a reasonable juror could find that McDonald was promised continued tenure in any particular position. Consequently, the court reasoned that since Union Camp offered McDonald two other positions which McDonald rejected, no reasonable juror could find that the agreement was breached. Therefore, the court directed a verdict in favor of Union Camp. This timely appeal ensued.

II.

According to the Elliott-Larsen Civil Rights Act, Mich. Comp. Laws Ann. §37.2202(1)(a), an employer shall not discharge an employee because of age. This provision is similar to the federal Age Discrimination in Employment Act (ADEA) in that the same evidentiary burdens prevail. *See Simpson v. Midland-Ross Corp.*, 823 F.2d 937 [44 FEP Cases 418] (6th Cir. 1987); *Gallaway v. Chrysler Corp.*, 105 Mich. App. 1, 306 N.W.2d 368, 370-71 [33 FEP Cases 500] (1981) (adopting Sixth Circuit analysis in *Laugesen v. Anaconda Co.*, 510 F.2d 307 [10 FEP Cases 567] (6th Cir. 1975)). A Michigan plaintiff who alleges unlawful employment discrimination generally has three approaches at his disposal. First, he may proceed under the approach enunicated by the United States Supreme Court in the landmark case of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 [5 FEP Cases 965] (1973). The second approach is one delineated by the Michigan courts which generally examines whether age was a determinative factor in the plaintiff's discharge. Finally, a plaintiff may proceed by showing through circumstantial, statistical or direct evidence that he has been discriminated against.

A. *McDonnell Douglas* Approach

The traditional approach for proceeding under an employment discrimination claim was established in *McDonnell Douglas*

Corp. v. Green, 441 U.S. 792 [5 FEP Cases 965] (1973), and has been routinely employed in this circuit. *See, e.g., Simpson v. Midland-Ross Corp.,* 823 F.2d 937 [44 FEP Cases 418] (6th Cir. 1987); *Wilkens v. Eaton Corp.,* 790 F.2d 515 [40 FEP Cases 1349] (6th Cir.), *reh'g denied,* 797 F.2d 342 [45 FEP Cases 525] (1986); *Laugesen v. Anaconda Co.,* 510 F.2d 307 [10 FEP Cases 567] (6th Cir. 1975). A plaintiff making such a claim carries the initial burden of proving by a preponderance of the evidence a prima facie case of age discrimination. *See McDonnell Douglas,* 411 U.S. at 802. This requires a showing that:

> (1) he was a member of a protected class (age 40 to 70);
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> (2) he was subjected to adverse employment action;
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> (3) he was qualified for the position; [and]
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> (4) he was replaced by a younger person.

Simpson, 823 F.2d at 940 (application of *McDonnell Douglas* to the age discrimination context). Proof of all four criteria raises a presumption of age discrimination. *Id.* If the plaintiff succeeds in proving the prima facie case, the burden then shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's [discharge]." *McDonnell Douglas,* 411 U.S. at 802. Finally, should the employer carry this burden, the plaintiff then must prove by a preponderance of the evidence "that the legitimate reasons offered by the [employer] were not its true reasons, but were a pretext for discrimination. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253 [25 FEP Cases 113] (1981). This essentially amounts to a showing that the "presumptively valid reasons for his [discharge] were in fact a cover-up for a racially discriminatory decision." *McDonnell Douglas,* 411 U.S. at 805.

[1] Application of this standard to the instant case reveals that McDonald is unable to prove a prima facie case of age

discrimination. There is no question that McDonald, age 53, is a member of the protected class; and indeed, he was terminated. Thus, the first two prongs are satisfied. However, McDonald is unable to prove the third prong of the *McDonnell Douglas* test, that he was qualified for the position.

In order to show that he was qualified, McDonald must prove that he was performing his job "at a level which met his employer's legitimate expectations." *Huhn v. Koehring,* 718 F.2d 239, 243 [32 FEP Cases 1684] (7th Cir. 1983). Moreover, "[i]f [McDonald] was not doing what his employer wanted him to do, he was not doing his job. . . . [McDonald] does not raise a material issue of fact on the question of the quality of his work merely by challenging the judgment of his supervisors." *Kephart v. Institute of Gas Technology,* 630 F.2d 1217, 1223 [23 FEP Cases 1412] (7th Cir. 1980), *cert. denied,* 450 U.S. 959 [24 FEP Cases 1827] (1981). In this case, McDonald does not dispute, but in fact acknowledges that his supervisors were dissatisfied with his job performance in the summer of 1986 when he was discharged. Instead McDonald argues that Union Camp made too big a deal out of his alleged "people problems." However, the aim is not to review bad business decisions, or question the soundness of an employer's judgment. *See Wilkens v. Eaton Corp.,* 790 F.2d 515, 521 [40 FEP Cases 1349] (6th Cir. 1986). McDonald was simply not performing to Union Camp's satisfaction. Since McDonald concedes this point, there remains no genuine issue of material fact as to whether he was qualified. *See* Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Consequently, McDonald has failed to prove a prima facie case of age discrimination, and therefore, summary judgment under the *McDonnell Douglas* approach is appropriate.

B. Michigan Law Approach

According to the Michigan Supreme Court in *Matras v. Amoco Co.,* 424 Mich. 675, 385 N.W.2d 586 [43 FEP Cases 931] (1986), a plaintiff may establish a prima facie case of age

discrimination under the Elliott-Larsen Civil Rights Act by demonstrating that age was a determinative factor in the employer's adverse employment action. Where the plaintiff proceeds on a theory of intentional discrimination, as in the case at bar,[2] the elements by which he may demonstrate that age was a determinative factor in discharging him are: (1) that he is a member of the affected class; (2) that some adverse employment action was taken against him; (3) that the person responsible for this adverse action was predisposed to discriminate against persons in the affected class; and (4) that the person responsible for this adverse action had actually acted on this predisposition with respect to the plaintiff. *See Brewster v. Martin Marietta Aluminum Sales, Inc.*, 145 Mich. App. 641, 378 N.W.2d 558 [47 FEP Cases 1276] (1985); *Jenkins v. Southeastern Michigan Chapter American Red Cross*, 141 Mich.App. 785, 369 N.W.2d 223 [43 FEP Cases 1145] (1985); *Schipani v. Ford Motor Co.*, 102 Mich.App. 606, 302 N.W.2d 307 [30 FEP Cases 361] (1981); *Michigan Civil Rights Commission ex rel. Boyd v. Chrysler Corp.*, 80 Mich.App. 368, 263 N.W.2d 376 [22 FEP Cases 1160] (1977).

[2] Under this approach, McDonald satisfies the first two elements: that he was a member of the affected class and he was terminated. However, McDonald again fails to satisfy the third prong, that the person responsible for his discharge was predisposed to discriminate against persons in the affected class. McDonald argues that certain remarks made by his direct supervisor, Chris Bakaitis, indicate a clear case of age bias.[3] Assuming

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[2] In considering McDonald's claim with respect to Michigan law, the district court incorrectly applied the "disparate treatment" standard. McDonald does not allege that he was treated differently than those similarly situated, but rather that he was intentionally discriminated against.

[3] McDonald testified that Bakaitis once remarked that a senior salesman at age 55 "could be cheaply replaced with a younger salesman." McDonald further testified that on several other occasions. Bakaitis made comments involving age bias that were directed at McDonald.

arguendo that Bakaitis was, in fact, predisposed to age discrimination, McDonald's argument is, nevertheless, without merit. McDonald was fired by Bakaitis' supervisor, Carl Raglin, and Bakaitis' discriminatory remarks are not attributable to Raglin. This circuit has held that a statement by an intermediate level management official is not indicative of discrimination when the ultimate decision to discharge is made by an upper level official. *Stendebach v. CPC Internat'l Inc.*, 691 F.2d 735 [30 FEP Cases 233] (6th Cir. 1982), *cert. denied*, 461 U.S. 944 [31 FEP Cases 1296] (1983); *see also La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405 [36 FEP Cases 913] (7th Cir. 1984). Moreover, there is no evidence, nor has McDonald made such an allegation, that Raglin was predisposed to age discrimination.[4]

Consequently, there remains no genuine issue of material fact with respect to the third and fourth prongs. Thus, McDonald has failed to prove a prima facie case of age discrimination under the standard adopted by the Michigan courts, and therefore, summary judgment is appropriate.

C. Direct, Statistical or Circumstantial Evidence Approach

Although the *McDonnell Douglas* standard has proven to be an effective means of resolving employment discrimination suits, not all cases are susceptible to its use. This court has repeatedly held that age discrimination suits should be decided on a case by case basis, and that rigid adherence to *McDonnell Douglas* should be discouraged. *Wanger v. G.A. Gray Co.*, 872 F.2d 142 [49 FEP Cases 800] (6th Cir. 1989); *Merkel v. Scovill*, 787 F.2d 174 [40

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[4] In fact, on several occasions, when intermediate management officials recommended to Raglin that McDonald be discharged, Raglin disregarded these recommendations and kept McDonald on. However, in 1986, after observing McDonald more closely, Raglin described McDonald as "stubborn, obstinate, and unwilling to adapt to changing management philosophies, or even simply to do what I told him to do." Raglin affidavit at 2. This is what led to McDonald's termination.

FEP Cases 1383] (6th Cir.), *cert. denied*, 479 U.S. 990 [42 FEP Cases 560] (1986); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (27 FEP Cases 1563] (6th Cir. 1982); *Sahadi v. Reynolds Chem.*, 636 F.2d 1116 [23 FEP Cases 1338] (6th Cir. 1980) (per curiam). "Instead of a mechanistic application of the *McDonnell Douglas* guidelines, a trial judge is to consider 'direct evidence of discrimination, and circumstantial evidence other than that which is used in the *McDonnell Douglas* criteria.' " *Wanger*, 872 F.2d at 145 (*quoting Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1180 [30 FEP Cases 1177] (6th Cir. 1983)). A plaintiff may present a prima facie case of age discrimination "by introducing evidence that he was adversely affected by the defendant's employment decisions 'under circumstances which give rise to an inference of unlawful discrimination.' " *Ridenour v. Lawson Co.*, 791 F.2d 52, 55 [40 FEP Cases 1455] (6th Cir. 1986) (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 [25 FEP Cases 113] (1981)).

Moreover, whether analyzed in terms of Michigan's Elliott-Larsen Act or federal law, the same evidentiary burdens prevail. *Simpson*, 823 F.2d at 940. Consequently, once the plaintiff proves a prima facie case of discrimination, the burden of production shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's [discharge]." *McDonnell Douglas*, 411 U.S. at 802. If the employer is successful, the presumption raised by the prima facie case is rebutted, thereby placing the ultimate burden of persuasion upon the plaintiff. *See Ridenour*, 791 F.2d at 56. The plaintiff must then "demonstrate that the [employer's] proffered reasons for its actions were pretextual." *Id.*

[3] To prove a prima facie case of age discrimination, McDonald must present evidence indicating that age was a factor in Union Camp's decision to terminate him, McDonald's allegations focus primarily on comments made by General Manager

Bakaitis, which were allegedly directed at McDonald. McDonald alleged that Bakaitis often commented to McDonald about the length of time he had been with the company and stated that his supervisory techniques were outdated. McDonald also claimed that during an office meeting, Bakaitis indicated that Bill Chapman, who was the plant's most senior salesman at age 55, should be replaced with a younger salesman who would be cheaper to employ. McDonald alleged that these types of remarks were not isolated incidents and were made by Bakaitis on several other occasions. Consequently, when viewed in a light most favorable to McDonald, we find that the pleadings and depositions raise an inference of discrimination sufficient to satisfy a prima facie case.

However, Union Camp has produced a legitimate, nondiscriminatory reason for its decision. McDonald's alleged "people problems" were well documented and dated back as far as 1970. Since McDonald was unwilling to change his methods to conform with Union Camp's wishes and refused to accept a different position, albeit a new position which essentially amounted to a demotion, Union Camp was left with no other alternative but to discharge McDonald.

With respect to pretext, McDonald argues that Union Camp made too big a deal out of his alleged "people problems," and that such was merely a cover-up for unlawful age discrimination. However, mere conclusory allegations are not sufficient to withstand a motion for summary judgment. *See Patterson v. General Motors Corp.*, 631 F.2d 476, 482 [23 FEP Cases 894] (7th Cir. 1980), *cert. denied*, 451 U.S. 914 [27 FEP Cases 221] (1981). Furthermore, the fact that McDonald disagrees with Union Camp's assessment of his performance as manufacturing manager does not render Union Camp's reasons pretextual. As previously stated, McDonald does not raise a factual dispute by alleging that Union Camp made a poor business decision. *Kephart*, 630 F.2d at 1223; *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 559-61 [44 FEP Cases 1137] (7th Cir.) ("A reason honestly described but

poorly founded is not a pretext as that term is used in the law of discrimination."), *cert. denied,* 484 U.S. 977 [45 FEP Cases 648] (1987); *Gray v. New England Telephone & Telegraph Co.,* 792 F.2d 251, 255 [40 FEP Cases 1597] (1st Cir. 1986) (not enough to show employer made an unwise business decision). Finally, the allegedly discriminatory remarks made by Bakaitis are not attributable to Raglin, who was the ultimate decision maker. *See La Montagne,* 750 F.2d at 1412. Consequently, McDonald fails to raise a genuine issue of material fact that Union Camp's reason to discharge him was pretextual, and therefore, summary judgment is appropriate.

Thus, whether analyzed according to the dictates of *McDonnell Douglas,* the standard delineated by the Michigan courts, or the direct, statistical or circumstantial evidence approach, McDonald fails to raise a factual dispute sufficient to withstand summary judgment.

III.

In his second count, McDonald alleged that his discharge was a breach of his employment contract. Specifically, McDonald alleged that, although he had no written employment contract, his employer's actions and representations created an implied contract not to be terminated except for just cause. In granting Union Camp's motion for directed verdict, the district court made two findings: (1) that certain representations made to McDonald, such as his "future being secure," provided sufficient evidence to create a jury question of whether an employment contract existed; and (2) that no reasonable juror could find a breach of that contract because there had been no promise to retain McDonald in the position of manufacturing manager. The court reasoned that since Union Camp had offered McDonald another position with the company with no reduction in salary, which he had refused to accept, there had been no breach of contract as a matter of law and that Union Camp had just cause to terminate

him. In addition, the court permitted McDonald to amend his complaint pursuant to Fed. R. Civ. P. 15(b) to allege that he was constructively discharged when offered the demotions; the court, however, stated that this did not change its ruling and directed a verdict for Union Camp.

In actions where jurisdiction is based upon diversity of citizenship, federal courts are required to apply state law when determining whether there is sufficient evidence to present a case to a jury for resolution. *Gold v. National Savings Bank of the City of Albany,* 641 F.2d 430 (6th Cir. 1980), *cert. denied,* 454 U.S. 826 (1981). Consequently, Michigan law must be applied in determining whether the trial court in the case at bar properly directed a verdict for Union Camp.

According to Michigan law, a trial court must conclude that reasonable persons could reach but one conclusion before directing a verdict. *Marietta v. Cliffs Ridge, Inc.,* 385 Mich. 364, 189 N.W.2d 208 (1971); *Gootee v. Colt Industries, Inc.,* 712 F.2d 1057 (6th Cir. 1983). Furthermore, the court must view all evidence in the light most favorable to the non-moving party, "without weighing the credibility of witnesses or considering the weight of the evidence. . . ." *Gootee,* 712 F.2d at 1062. The same standard is applicable on appeal. *See Milstead v. Internat'l Brotherhood of Teamsters,* 580 F.2d 232 [99 LRRM 2150] (6th Cir. 1978). Applying this standard to the instant case, this court is compelled to affirm the judgment below.

It is generally recognized by Michigan courts and federal courts applying Michigan law, that employers' handbooks, policy statements and oral representations can create binding contractual obligations limiting the employers' right to discharge an employee at will. *Toussaint v. Blue Cross & Blue Shield of Mich.,* 408 Mich. 579, 292 N.W.2d 880 [115 LRRM 4708] (1980). Such a provision may be created as a result of an employee's legitimate expectations based upon the employer's conduct and practices. *Id.* at 885. However, an employee's mere subjective

expectation that he will not be discharged except for just cause "is insufficient to establish a contract implied in fact." *Schwartz v. Michigan Sugar Co.*, 106 Mich.App. 471, 308 N.W.2d 459, 462 [115 LRRM 4535] (1981). Ultimately, based upon an examination of the evidence, whether it be a personnel manual or oral statements relating to job security, the existence of a legitimate expectation of continued employment is a question for the trier of fact. *See Bullock v. Auto. Club of Mich.*, 146 Mich.App. 711, 381 N.W.2d 793 (1985).

McDonald produced the following evidence at trial: (1) statements made by upper-level management that he could expect job security as long as he did his job; (2) statements that if he did a good job, he could expect promotional opportunities; and (3) evidence of awards, salary increases and bonuses based on favorable evaluations. Clearly, this evidence creates an inference that McDonald had a contract implied in fact with Union Camp under which he could be discharged only for just cause.

The next inquiry concerns the terms of the contract. The district court found that the evidence could not support a finding that McDonald was promised the manufacturing manager's position, only that he was promised a position. McDonald, however, claims that there was sufficient evidence to infer that he was promised continued employment as a manufacturing manager, and consequently, when he was offered the demotions, he was effectively discharged.[5]

The question as to the terms of an implied contract is generally one for the trier of fact. *See Toussaint,* 408 Mich. at 613; *Farrell,* 155 Mich.App. at 386; *Bullock,* 146 Mich App. at 719-20. In *Richards v. Detroit Free Press,* 173 Mich.App. 256, 433 N.W.2d 320 (1988), the court held that it was a question of fact for the jury whether the statements made to an employee

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[5] Since we ascribe to McDonald's contention in this respect, we need not address the issue of constructive discharge.

created a right to a particular job. *Id.* at 322. The *Richards* court further opined that "[a] demotion from one job to a lesser job is a discharge from the first job, and a demotion will support a wrongful discharge claim." *Id.* In the instant case, a reasonable juror could find that by promoting McDonald to manufacturing manager, he would not be demoted by Union Camp without just cause. Thus, unlike the district court, we find that a jury question exists as to whether the promises made to McDonald relating to job security applied to his job as manufacturing manager, or merely to his general employment with Union Camp. Despite this finding, however, if McDonald was terminated for just cause, it is immaterial which position he was entitled to.

The final issue is whether the contract was breached. Specifically, it must be determined whether McDonald's discharge was for just cause. Although this question is generally one of fact, *Toussaint*, 408 Mich. at 620-21, we hold that McDonald failed to present sufficient evidence to submit this issue to the jury and accordingly a directed verdict was properly granted. The evidence is uncontradicted — McDonald was simply not living up to Union Camp's legitimate business expectations. McDonald clearly had problems motivating his subordinates and delegating authority; these problems were documented as far back as 1970. Furthermore, on at least two occasions, it was recommended that McDonald be discharged due to his inability or unwillingness to correct these problems. McDonald was not discharged, however, since he had been compiling favorable production numbers. However, during the year 1985, after McDonald was told that he would not be promoted to the Plant General Manager job, these manufacturing performance numbers for which McDonald was ultimately responsible began to trend in the wrong direction.[6]

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[6] Corrugator tons per scheduled hour went down unfavorably, while the other three key indicators, man hours per ton, input ratio, and waste percentage all showed unfavorable increases. In addition, the plant received negative evaluations in April and May of 1986 in the regular housekeeping and safety inspections.

Consequently, Union Camp could no longer afford to overlook McDonald's deficiencies.

Examination of the record reveals that McDonald's presentation of proof contained no evidence of a wrongful discharge. McDonald acknowledged his personnel deficiencies but claimed that his dismissal was unwarranted. This is hardly a basis from which a jury could find in his favor, and we therefore decline to extend the *Toussaint* protections this far. Furthermore, McDonald, in his brief on appeal, impermissibly attempts to interject claims of age discrimination as a basis for a breach of contract claim. We have already ruled that McDonald was not discharged because of his age, *see supra*, and therefore, it is improper to reargue the point at this stage. *See Johns-Manville Corp. v. Guardian Industries Corp.*, 116 F.R.D. 97 (E.D. Mich. 1987) (issues decided at an earlier stage of litigation constitute the law of the case).

The wisdom of Union Camp's business decision is not at issue, rather the sole inquiry is whether Union Camp had just cause to terminate McDonald. In light of the overwhelming evidence of McDonald's deficient job performance and McDonald's failure to present any credible evidence that his discharge was for any reason other than his "people problems," we hold that no reasonable jury could find that McDonald's discharge was not for just cause,[7] and therefore, the directed verdict was proper.

For the foregoing reasons, the order granting summary judgment in favor of Union Camp on the age discrimination count,

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[7] Moreover, even if the jury found that McDonald was not entitled to his job as manufacturing manager, but only to a job within the company, his eventual termination was for just cause since he rejected the other offers made to him after his demotion. The record shows that Union Camp spent a great deal of time and money trying to relocate McDonald to a suitable position within the company. Since McDonald rejected the offers that Union Camp thought he could handle, termination was the only alternative.

and the judgment directing a verdict in favor of Union Camp on the breach of employment contract count are affirmed.